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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~304.~~ 79

ANNIE HOUGH, IN HER OWN RIGHT AND AS NATURAL GUARDIAN AND NEXT FRIEND OF JAMES H. HOUGH, PLAINTIFF IN ERROR.

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

November 8, 1876
FILED ~~FEBRUARY 21, 1879~~

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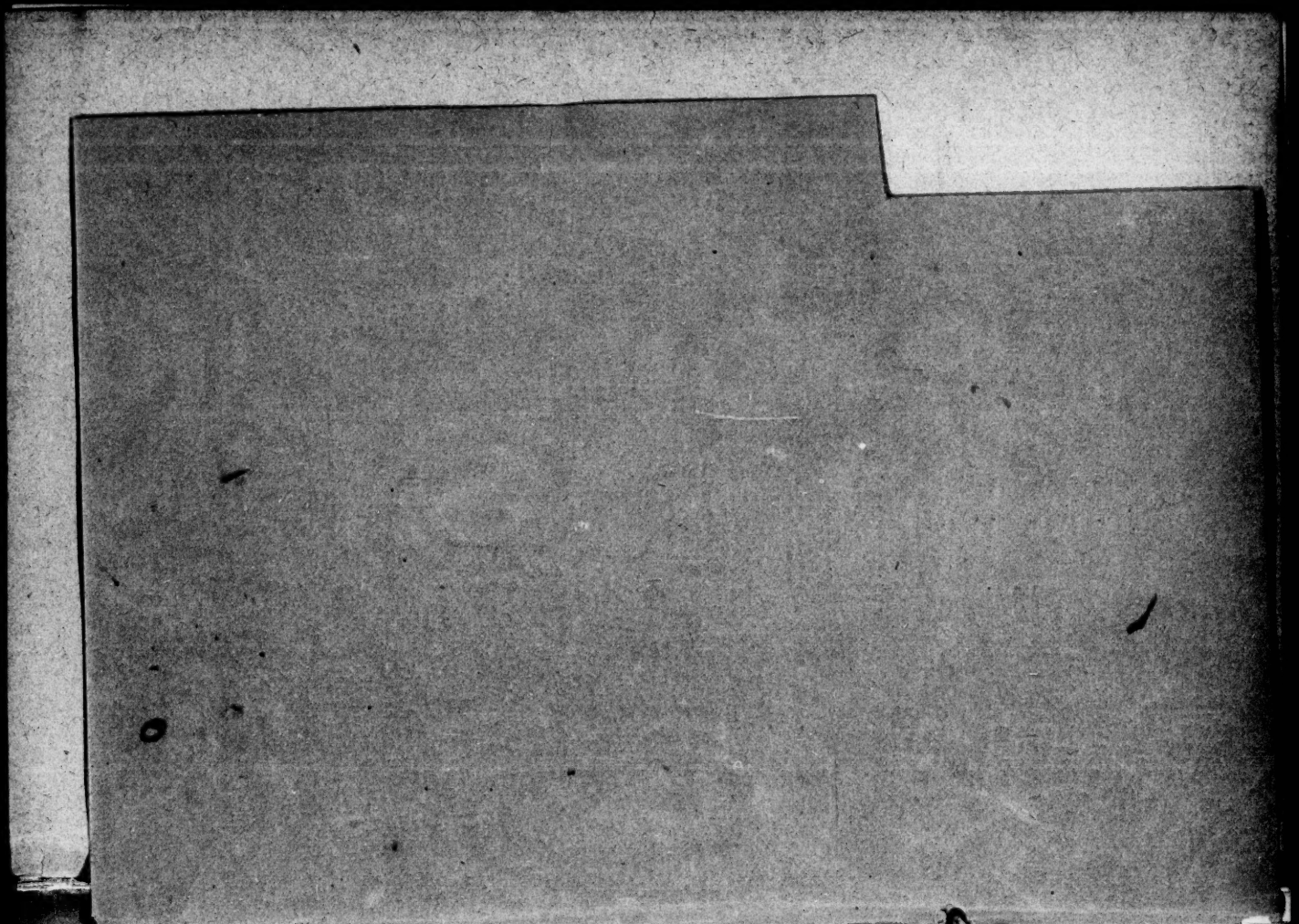

SUPREME COURT OF THE UNITED STATES.

No. 304.

ANNIE HOUGH, IN HER OWN RIGHT AND AS NATURAL GUARDIAN AND NEXT FRIEND OF JAMES H. HOUGH, PLAINTIFF IN ERROR.

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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1 District court, April term, 1875.

THE STATE OF TEXAS,
Harrison County:

To the honorable M. D. Ector, judge of the sixth judicial district:

Your petitioner, Annie Hough, a citizen of Clinton County, Iowa, who sues in her own right, and as the natural guardian and next friend of her infant child, James A. Hough, complaining, shows your honor that she is the surviving wife of Wentworth C. Hough, late of Harrison County, Texas, and that her child, James A. Hough, is the only surviving child of her said husband.

Said plaintiff shows that her said husband was in the month of March, 1874, in the employment of the Texas and Pacific Railway Company, in charge of engine No. 4, running between the city of Shreveport in Louisiana and the city of Marshall in Texas, and that on or about the 8th day of March, 1874, the engine run by her said husband was thrown from the track at a point about 8 mile' east of Marshall, and her husband killed.

2 Said plaintiff shows that her said husband' death was the result of the wilful and gross neglect of said Texas and Pacific Railway Company in this: that said company did not furnish a safe and reliable engine with which to operate said road; that the said engine was thrown from the track by a steer attempting to cross in front while in motion, in such a way and at such a distance that it would have been impossible to have reversed or stopped the engine in time to have avoided the accident, but that the pilot or cow-catcher in front of said engine was of such a construction that it would not throw said animal off the track as it should have done, said pilot being, as said plaintiff is informed, full ten inches above the track. When properly constructed, it should not have been exceeding one inch above the track; that in consequence of such faulty construction, said pilot passed over the body of said animal when it should have passed under and thrown it off; that in consequence of such faulty construction, said animal was thrown under the wheels of the engine, throwing it off the track.

3 Said plaintiff further shows that her said husband, to save the train and lives of passengers entrusted to his care, reversed the engine and put on all the brakes and stopped the train, but in doing so was too late to save himself, but was caught under the engine as it turned over the embankment where the accident occurred.

Said plaintiff shows that the injury sustained by her said husband by reason of the falling of his engine as aforesaid, would have been comparatively slight but for the want of suitable and safe machinery attached to his said engine; that attached to said engine was a steam-whistle fastened into the upper side of the boiler; that when the engine fell over the embankment, the fastenings of said whistle blew out and a jet of scalding steam and hot water was thrown upon her said husband as he lay with his foot imprisoned under the engine, in consequence of which, his whole face, body, and limbs were so burned and scalded that he died the following morning. Now, said plaintiff shows that

4 the giving way of said whistle was the result of the gross carelessness and neglect of said company and owing entirely to its defective fastenings; that had said whistle been properly and securely fastened it would have been impossible for it to have blown out, and utterly impossible for the steam and hot water to have escaped; that,

properly constructed, the whistle and its fastenings to the boiler is the most secure about the entire engine.

Said plaintiff shows that her said husband was at the time of his death twenty-nine years of age; that he was a skilled mechanic and machinest, and that his services were reasonably worth two thousand dollars per year; that he was a sober and industrious man, perfectly strong and healthy, and bid fair to live to an old age; that said plaintiff and her said child were dependant entirely on her said husband for support and maintenance, and are in consequence of his death left entirely destitute, and that in consequence of the loss of the husband and father as aforesaid, said plaintiff and her said child have sustained an actual
5 damage of thirty thousand dollars; and said plaintiff shows that the loss of her said husband was, as before charged, the result of the criminal and gross neglect of said company in not supplying safe and reliable machinery, in consequence of which she has been robbed of her husband and her child of its father. She therefore prays that said Texas and Pacific Railway Company be cited to appear at the next term of this court to answer this petition, and she prays judgment for her actual damages as aforesaid, and she prays for exemplary damage in the sum of fifty thousand dollars against said company, with all costs of suit, and she prays for general relief in the premises.

TURNER AND LIPSCOMB,
Att'ys for Pl'ff.

Filed 7th Dec'r 1874.

W. C. PIERCE, *Clerk.*

Citation.

STATE OF TEXAS,
County of Harrison:

To the sheriff or any constable of Harrison County, greeting:

6 You are hereby commanded to summon the Texas and Pacific Railway Company to appear before the district court of Harrison County, at the court-house in the city of Marshall, on the 1st Monday in April, 1875, there to answer a petition filed in said court, wherein Annie Hough et al. is plaintiff and the Texas and Pacific Railway Company is defendant, as per copy of said petition will more fully appear.

Herein fail not.

Test, W. C. Pierce, clerk of the district court of Harrison County, and seal of same, at Marshall, this 16th day of Dec'r, 1874.

W. C. PIERCE, *Clk.*

Issued 16th Dec'r, 1874.

W. C. PIERCE, *Clerk.*

Officer's return.

Came to hand Dec'r 16th, 1874, and executed same day by delivering to George Noble, gen'l sup't of the Texas and Pacific Railway Company in person, at the principal office of said T. and P'w'y Co., in the city of Marshall, a true of this writ, together with a certified copy of plaintiffs' original petition accompanying the same.

M. B. HARWELL, *Const.*

Defendant's answer.

In Harrison district court, May term, 1875.

ANNIE HOUGH ET AL.
vs.
TEXAS AND PACIFIC RAILROAD COMPANY.

7 And now comes the defendant and says that plaintiffs' said petition is not sufficient in law.

And for plea and answer to said petition the said defendant comes and denies all and singular the allegations therein made, and puts itself upon the country.

F. B. SEXTON,
WM. STEADMAN,
Def'ts' Att'ys.

Filed 18th May, 1875.

W. C. PIERCE, *Clerk.*

Order to amend.

May term, 1875.

8th JUNE, 1875.

Def't has leave to amend.

Amended answer.

District court, May term, 1875.

THE STATE OF TEXAS,
County of Harrison:

ANNIE HOUGH ET AL.
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

And now comes the said defendant, leave of the court being first had and obtained, and amends its answer heretofore filed herein and says:

That at the time the accident complained of and described in plaintiffs' petition occurred, said engine No. 4, which was run by the
8 said Wentworth C. Hough, was entirely safe and reliable, and was constructed in accordance with the usual and generally approved plan of constructing locomotive steam-engines; that the pilot or cow-catcher attached to said engine was properly constructed and attached to said engine at the usual and proper height from the iron rail, and was not, as said plaintiff charges, ten inches in height from said iron rail, but was not more than two inches from said rail; that if said locomotive-engine No. 4 was thrown from the track as charged by plaintiff, it was not so thrown from the track in consequence of a bull or steer getting in front of and under the said pilot of said engine, but because said bull or steer ran in between the driving wheels and forward trucks of said engine, at such a time and under such circumstances as rendered it impossible for any human sagacity or exertion to prevent said engine being thrown from the track.

Further amending, this defendant says that the whistle to the said locomotive-engine No. 4 was securely and thoroughly fastened to the boiler of said engine, and was fastened to said boiler in accord-
9 ance with the usual and generally approved modes of fastening whistles to boilers, and that if said whistle came out of said engine, it did not blow out as charged by said plaintiff, but was knocked or torn out in consequence of said engine's being thrown violently from

the track (as hereinbefore stated), turned over, and thrown down an embankment 15 or 20 feet high, by reason whereof said whistle was thrown violently against a stump.

Farther answering, this defendant says, that if there was any defect whatever in said locomotive engine No. 4 (which is not admitted), said defect was latent, and could not be perceived by external examination, nor by the exercese of any reasonable, usual, and ordinary diligence.

Further amending, this defendant says that if there was any defect in said engine No. 4 which was not latent (which is not admitted, but denied by the defendant), said defect was well known to the said Wentworth C. Hough, who was a locomotive engineer by profession,
10 and then in the employment of this defendant; and the said Wentworth C. Hough had better opportunities for knowing the defects, if any existed, in said engine No. 4 than any other person; and defendant says that if any defects existed in said engine No. 4, they were not known to this defendant, but were well known to the said Wentworth C. Hough, and it was his duty to report said defects to the proper officers and agents of this defendant; but said Hough did not report any such defects to this defendant or to any its proper officers or agents.

Further amending, this defendant says that the said Wentworth C. Hough had been for several months previous to the accident described in plaintiffs' petition in the employment of this def't as a locomotive engineer, and had, previous to the said accident, used and run other engines belonging to this defendant; but that the said Hough specially applied for and took the run from Marshall to Shreveport, well knowing that said engine No. 4 belonged to and was used on said run, all of which the said defendant is ready to verify.

STEDMAN AND SEXTON,
11 *Attorneys for Def't.*

Filed 9th June, 1875.

W. C. PIERCE, *Clerk.*

Petition to remove this suit to the circuit court.

District court, May term, 1875.

THE STATE OF TEXAS,
County of Harrison:

ANNI' HOUGH ET AL.
vs.
THE TEXAS AND PACIFIC RAILROAD COMPANY.

To the honorable the district court of the sixth judicial district of Texas:

The petition of the Texas and Pacific Railroad Company, a corporation created by an act of the Congress of the United States, having its principal office and domicil in the city of Philadelphia, in the State of Pennsylvania, and its local domicil and office in the city of Marshall, in the county of Harrison, in the State of Texas, respectfully shows: That a suit of a civil nature at law has been instituted against your petitioner by Annie Hough in her own right, and as natural guardian and next friend of her infant child, James A. Hough, citizens of the county of Clinton, in the State of Iowa, in the district court of Harrison
12 **county, Texas, and that the matter in dispute in said suit exceeds the sum or value of five hundred dollars.**

Petitioner prays that said suit, in accordance with the provisions of an act of the Congress of the United States, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3rd, 1875, may be removed from this court to the circuit court of the United States for the western district of Texas, at Tyler.

And petitioner herewith tenders bonds and security, in accordance with the provisions of the act of Congress above referred to, in the sum of one thousand dollars.

STEDMAN AND SEXTON,
Att'ys f'r Petitioner.

Filed 10th June, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Dep'ty.*

Bond for the removal of said cause to circuit court.

STATE OF TEXAS,
County of Harrison:

Know all men by these presents, that The Texas and Pacific
13 Railway Company, as principal, and as surities, are held and firmly bound unto Annie Hough, in her own right, and as natural guardian and next friend of her infant child, James A. Hough, in the sum of one thousand dollars, conditioned that, whereas the said Annie Hough, in her own right, and as natural guardian and next friend of her infant child, James A. Hough, has instituted suit in the district court of Harrison County, Texas, said suit being numbered six thousand two hundred and twenty-seven (6,227) on the docket of said district court of Harrison County, against the said Texas and Pacific Railway Company; and whereas the said Texas and Pacific Railway Company has, in *in* accordance with the provisions of an act of the Congress of the United States, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3rd, 1875, applied for and obtained from the district court of said county of Harrison, in the State of Texas, an order re-
14 moving said suit from the said district court of Harrison County, Texas, to the circuit court of the United States for the western district of Texas, at Tyler:

Now, therefore, if the said Texas and Pacific Railway Company shall, on the first day of the next term of said circuit court of the United States for the western district of Texas, at Tyler, enter in said circuit court, on the said first day of the next session thereof, a copy of the records in said suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be null and void; otherwise to remain in full force and effect.

Given under our hands this 9th day of June, A. D. 1875.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By FRANK BOND, *Vice Pres'd't.*
J. H. THOMPSON.
W. P. HUDGINS.

Approved this the 16th June, 1875.

W. C. PIERCE, *Clk.*

Filed June 10th, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy.*

Judgment on petition.

15 ANNIE HOUGH ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

This cause being regularly called for trial, the defendant presents its petition to the court to remove this cause to the circuit court of the United States for the western district of Texas, at Tyler, in accordance with the provisions of an act of the Congress of the United States, entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes," approved March 3d, 1875; and the defendant having filed a bond as required by the said act of Congress, and it appearing to the court that the defendant is entitled to have this cause removed from this court to the said circuit court of the United States for the western district of Texas, in accordance with the said petition and bond,

It is therefore ordered by the court that this cause be removed from this court into the circuit court of the United States for the western district of Texas, at Tyler.

16 STATE OF TEXAS,
County of Harrison:

To any public officer of the county of Douglass, State of Nebraska, having authority under the laws of said State to take depositions:

Know ye, that reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and all means, at such time as you may appoint, R. M. Connell; and that you then and there carefully examine him upon oath, first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce, or cause to be reduced, his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2d. That you certify your hand and seal of office that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing
17 your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit and the name of the witness, directing it "To the clerk of the district court of Harrison County, Texas."

5th. That; if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession and undergone no alteration; which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough et al. are plaintiffs and the Texas and Pacific Railway Company is defendant.

Herein fail not, and return make.

Test W. C. Pierce, clerk of the district court of Harrison County, and seal of said court, at Marshall, this 4th day of May, 1875.

[SEAL.] W. C. PIERCE,
Clerk Dist. Court, Harrison County.

18 *Direct interrogatories to R. McConnel.*

THE STATE OF TEXAS,
Harrison County:

ANNIE HOUGH ET AL.
vs.
THE T. & P. R'W'Y CO.

Suit pending in the district court of Harrison County. May term, 1875.

Direct interrogatories propounded by plaintiff to R. McConnel, who lives in Omaha, Nebraska.

Int. 1st. Are you acquainted with the parties to this suit? If yea, how long have you known them?

Intg. 2d. What is your age, occupation, and residence?

Intg. 3d. If, in answer to 2d interrogatory, you say that you are a master mechanic, then state what are your duties as such, and on what railroad are you employed?

Intg. 4th. If, in answer to 3d interrogatory, you say that your duties as such master mechanic was and is to repair and keep in repair the engines on your road, then state how long you have been employed as a master mechanic.

Intg. 5th. How many engines have you had at any one time
19 under your charge, and how many miles did they run over?

Intg. 6th. Please state, if you can, the mode or manner of fastening a steam-whistle into or onto a locomotive; whether more than one mode of fastening or not; and if you say there is more than one way of fastening a steam-whistle to a locomotive, then state them.

Intg. 7th. In your experience as a railroad man, how many steam-whistles did you ever know to blow out where the steam-whistle had been properly put in in the first place?

Intg. 8th. What would be the probable result if the locomotive should run off of the track down an embankment from ten to fifteen feet high and the whistle should strike against some hard substance, if the whistle had been properly put in at first, if the steam-whistle was constructed and fastened to the boiler according to the most approved plan, would the whistle be knocked out so as to let the steam escape through the hole where the whistle goes into the boiler by such a fall as above described?

20 Intg. 9th. If, in answer to 2nd interrogatory, you say that you are a master mechanic, then state whether, as such master mechanic, it is a portion of your duties to know and understand that part of a locomotive called the pilot. If yea, then state how the pilot is constructed, how it is fastened to the engine, its length, the number of braces for staying the same (pilot), and the height of the pilot from the track when the road-bed is good.

Intg. 10th. If an engine, with a train, moving at a fair rate of speed, say twelve or fifteen miles per hour, with a pilot of the most approved construction, should strike a single animal standing on the track, say a bull weighing one thousand pounds, what, in your judgment, would be the result?

G. L. HILL,
TURNER AND LIPSCOMB.
Att'ys for Pl'ff.

Cross-intg. to same witness.

Cross-interrogatories to R. McConnell by def't.

X Intg. 1st. Do you know anything about locomotive No. 4, belonging to the defendant? If yea, state, if you know, how the whistle
21 of said engine was fastened to it on 8th March, 1874. If yea, state how it was so fastened, and whether or not it was fastened to said locomotive according to the approved plan of fastening whistles to locomotives.

X Intg. 2d. Sop'ose the whistle of a locomotive engine was improperly fastened to it, how long would it be before the place where the whistle was fastened would leak? From the ordinary and usual movement of such locomotives would not the engineer in charge of such locomotive be, if he properly performed his duties, the first man to discover such leak, and would it not be his duty under the ordinary and usual railroad regulations to report the fact to his superior officer, that is, to the master mechanic of the road on which he was employed?

X Intg. 3rd. Did you ever know of a locomotive engine when running at the rate of twelve of fifteen miles an hour to be thrown down an embankment ten or fifteen feet high, and the whistle thereof in
22 the fall to strike a stump a foot or more in thickness? If yea, when and where you saw the occurrence, and what was the result?

X Intg. 4. Are you related to the plaintiffs or either of them? If yea, state in what manner and in what degree.

F. B. SEXTON AND
WM. STEDMAN,
Def'ts' Att'ys.

THE STATE OF TEXAS,
Harrison County:

I, W. C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true and correct copy of the original direct and cross-interrogatories propounded to R. McConnell, a witness for pl'ff.

To certify which I hereto sign my name and affix the seal of my office at Marshall, this 4th May, A. D. 1875.

[SEAL.]

W. C. PIERCE,
C. D. C. H. C.

In the district court of Harrison County, State of Texas.

ANNIE HOUGH ET AL.
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

23 STATE OF NEBRASKA,
County of Douglass, ss:

By authority of the commission directed to any public officer of the county of Douglass, State of Nebraska, having authority under the laws of said State to take depositions and interrogatories accompanying the same, which are hereto attached, from the clerk of the district court of Harrison County, Texas, in the case of Annie Hough et al. vs. The Texas and Pacific Railway Company, now pending in said court, I caused to come before me at my office in the city of Omaha, in the said

county and State, the witness R. McConnell therein named, a resident of the county of Douglass, aged 57 years, who being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories in said case propounded to him proceeded to answer the same as follows:

Answer to direct intg.

1st intg. I do not know them, the lady.

24 Ans'r to 2 intg. My age is about 57 years. I reside in Omaha. Master machinist of the Union Pacific Railroad, east division.

Ans'r to intg. 3d. My duties is to see that the machinery is kept in proper condition; kept in good repair. Union Pacific Railroad running out of Omaha.

Ans'r to intg. 4th. I have been in charge of locomotives in that capacity for the last 23 years.

Ans'r to intg. 5. From 25 to 30 engines, and about 153 miles of road.

Ans'r to intg. 6th. There is two known ways to fasten whistles on locomotives, one by screwing into the dome cap, the other by having a flange with ball-joint and bolted to the dome cap.

Ans'r to intg. 7th. Not any.

" " " 8th. It would in all probability break off.

Ans'r to intg. 9th. The heighth from the track not less than three inches, nor more than 4½ inches clear of the rail; length of pilots, 4 feet 10 inches long, with two side braces and one center brace.

Ans'r to intg. 10th. In all probability it would throw the animal clear from the track.

Cross interrogatories to R. McConnell by def't.

25 *Answer to cross-interrogatories.*

Ans'r to 1st X Intg. I have no knowledge of the locomotive referred to.

Ans'r to 2d X Intg. It is the duty of the engineer at the end of his trip always to report any of the defects that he may find about his engine to the proper officer, under the direction of the master mechanic.

Ans'r to 3rd X Intg. I never saw or knew an occurrence of that kind.

Ans'r to 4th X Intg. I am not.

R. McCONNELL.

I, E. H. Buckingham, a notary public duly appointed and commissioned in and for said county and State, do hereby certify that the above depositions were sworn to before me by said witness, and by said witness subscribed in my presence. That the answers of said witness to the interrogatories and cross-interrogatories hereto attached were red'ced to writing by me in the presence of said witness, all at my office in the city of Omaha, county of Douglas, & State of Nebraska aforesaid, on the 1st day of May, A. D. 1875.

26 E. H. BUCKINGHAM,
Notary Public.

Filed 17th May, 1875.

W. C. PIERCE, *Clk.*

STATE OF TEXAS,
County of Harrison:

To the clerk of the district court of Dallas County, Texas, or any notary public in and for said county:

Know ye, that reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and all means, at such times as you may appoint, D. B. Hearsey, and that you then and there carefully examine him, upon oath first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce or cause to be reduced his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2nd. That you certify under your hand and seal of office that
27 said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing y'ur name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit, and the name of the witness, directing it "To the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession, and undergone no alteration; which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough
28 et al. is plaintiff and The T. & P. R'w'y Co. is defendant.

Herein fail not, and return make.

Test: W. C. Pierce, clerk of the district court of Harrison County, and seal of said , at Marshall, this 26th day of Dec'r, 1875.

[SEAL.]

Clerk district court, Harrison County.

Direct intg. to D. B. Hearsey.

ANNIE HOUGH ET AL.
vs.
THE T. & P. R'W'Y CO.

Suit pending in the district court of Harrison County, April, 1875.

Interrogatories to be propounded to D. B. Hearsey, a witness for the plaintiff, who resides in Dallas County, Texas.

Intg. 1st. What is your present occupation, and what was your occupation during the years 1873 and 1874; and in whose employ were you during the year 1873 and 1874, or any portion of said years?

Intg. 2d. If in answer to the first question you say that you are a practical machinist, and that during a portion of the time enquired of you were in the employ of the Texas and Pacific Railway Com-
29 pany, then state how long you have worked as a machinist, and what position you held in the employ of the def't.

Intg. 3rd. If, in answer to second interrogatory, you say that you held the position of master mechanic while you were in the employ of the defendant, then state what were your duties as such master mechanic, and what machinery, if any, did you have the immediate charge and control of?

Intg. 4th. If, in answer to the preceeding question, you say that it was your duty as such master mechanic to keep in repair and running order the engines and rolling stock of the defendant, then state the use and office of a pilot or cowcatcher on an engine or locomotive, and particularly how far above the track should the pilot be while the locomotive is running on the track; give if you can the average difference from the track and above it the pilot should be when the locomotive is on the track and in motion.

Intg. 5th. How is the pilot fastened to the engine? Is it fast-
30 ened so as to allow it swing up and down, or to swing from side to side while the train is in motion, or is it fastened immovably to the engine?

Intg. 6. If in answer to interrogatory 3rd you say that you had charge of the engines or locomotives of the defendant while you held the position of master mechanic in the defendant's employ, then state how the locomotive of defendant were dessignated or known, whether by numbers or names?

Intg. 7th. If in answer to the following question you say that locomotive of the defendant was dessignated by numbers, then state if the defendant did not have a locomotive in use upon its track known as the No. 4. If yea, what was the height of the pilot of said locomotive from the track when said No. 4 was moving on the track; also state, if you can, where said engine designated as the No. 4 was built; was it Pittsburg or a New Jersey engine; give the reason why you remember about the pilot of the No. 4, if you say indeed that you do remember about the pilot.

31 Intg. 8th. If in answering the last question you say that the No. 4, the engine enquired about of you, was built in Pittsburg, and in giving the reason why you remember about the pilot of the engine called the No. 4 you say that the reason you rem'ber so particularly about the height of the pilot of that engine from the track is because as the master mechanic of the defendant had condemned the pilot of the engine called the No. 4, then state why you had condemned the pilot in use on said engine. If yea, had you or not ever represented your action to the gen'l superintendant of the defendant?

Intg. 9th. If in answer to 8th interrogatory you say that you had reported your desire to condemn the pilot on the engine called the No. 4 to the gen'l superintendant of the defendant's road, then state whether the said gen'l superintendant allowed you to make the change you desired of or on the pilot of the engine called the No. 4.

Intg. 10th. You have been asked whether you are a practical machinist or not. If you answer that you are a practical machinist, then
32 state, if you can, how the steam-whistle of a locomotive is put in or fastened on or into the boiler, and whether, if the steam-whistle is properly put in, it would be easily blown or knocked out by the engine striking some hard substance while running at the rate of fifteen miles per hour.

Intg. 11th. If in answering tenth interrogatory you say that the steam-whistle of a locomotive would not be easily blown out or knocked out if properly put in, then state, if you can, whether it is a common or uncommon occurrence for the steam-whistle of a locomotive to be blown

out or knocked out either, so as to let the steam to escape through the hole or aperture thus formed.

Intg. 12th. If in answering eleventh interrogatory you say that it is an uncommon occurrence for the steam-whistle of a locomotive to be blown out, then state, if you can, the number of times in your experience as a machinist and railroad man that you have known the steam-whistle of locomotives to be blown out.

33

TURNER AND LIPSCOMB and
GEO. L. HILL,
Attorneys for Plaintiffs.

Cross-int'g's.

Cross-interrogatories propounded by the defendant to D. B. Hearsey, a witness for the pla ntiffs.

X Intg. 1st. If, in answer to any of the direct interrogatories propounded to you by plaintiffs, you say that you are a practical machinist, then please tell at what places and in what positions you have worked as such, and how long in each place and position.

X Intg. 2d. If, in answer to any of the direct interrogatories propounded to you by plaintiff, you say you have been a master mechanic for any railroad company, please say what mode you adopted of fastening pilots to locomotive-engines under your charge. How far above the track of the railroad (on which they were to be used) did you require pilots to be placed?

X intg. 3rd. If you say you have been a master mechanic for any railroad company, and especially if you say you were master
34 mechanic for the defendant, please tell what was your and responsibilities as such master mechanic. Was it not your duty to know and determine the condition of the locomotive-engines of the defendant, and were not said locomotive-engines under your exclusive control and management, as such master mechanic? Did the gen'l superintendent, or any other officer of the defendant, interfere with or control your discretion and management of said engines? And if so, state who interferred with your discretion, and how he interfered.

X Intg. 4th. Is it not customary and the duty of master mechanics of railroad companies to keep a round-house register, in which engines are required to record the time of their ar'ivals and all necessary repairs for their engines? Did you keep such a register while you were master mechanic for the defendant? If you say you did, what did you do with said register when you left the service of the defendant? If you
35 say you know anything with regard to engine No. 4, please say if the engineer of said engine ever reported to you, or to the round-house register, any work necessary to be done on said engine. If yea, please tell what engineer made the report and what work was reported, and when the report was made. If you say any work reported as necessary to be done on said engine, was it done? If not, tell why not, if you know.

X Intg. 5th. Please tell, if you know, in what condition the pilot of locomotive-engine No. 4 was when you left the service of the defendant. If you say said pilot was not in good or proper condition, please tell why it was not in good or proper condition.

X Intg. 6th. If, in answer to direct interrogatory 9th, you say that you condemned, or desired to condemn, locomotive-engine No. 4 of the defendant, please tell freely what were your reasons for making said

condemnation. To whom did you report said condemnation?
36 What changes did you recommend or desire to have made in or about said engine, or the pilot thereto attached? Did the then superintendant of the defendant's road absolutely prohibit you from making the change or changes you desired in and about said engine and pilot?

X Intg. 7th. On what part of a locomotive-engine is the steam-whistle placed, and how is it usually fastened? How was the steam-whistle of locomotive-engine No. 4 fastened to the boiler?

X Intg. 8th. Would it be impossible for the steam-whistle of a locomotive engine properly fastened, if said locomotive was running at the rate of 15 miles per hour, and thrown off the track, turned over and down an embankment 10 or 12 feet high, and thrown against a stump or other hard substance, to be torn or knocked off; would such an occurrence be impossible?

X Intg. 9th. If you have said that you were once master me-
37 chanic of the defendant, when did your employment as such begin and when did it cease? Were you not discharged from the service of defendant? If so, by whom were you discharged? Were you not discharged from the service of the defendant for incompetency? Are not your feelings very bitter toward the defendant and some of its principal officers, and have you not frequently expressed yourself very bitterly towards the defendant and some of its officers?

X Intg. 10th. Did you know Weatherford C. Hough while *while* you were in the service of the defendant? If yea, was he an engineer in the service of the defendant, and under your direction? And if yea, what engine did he run while in such service?

STEDMAN & SEXTON,
Atty's for Def't.

THE STATE OF TEXAS.
Harrison County:

I, W. C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true and correct copy of the direct and cross interrogatories now on file in my office in
38 the case of Annie Hough et al. vs. Texas and Pacific Railway Company, No. 6227.

To certify which I hereto sign name and affix the seal of my office, at Marshall, Dec'r 26th, A. D. 1874.

W. C. PIERCE, *Clk*,
By H. POPE, *Deputy.*

Issued 26th Dec'r, 1874.

W. C. PIERCE, *Clerk.*

Ans'r's to direct int'g's by D. B. Hearsey.

ANNIE HOUGH ET AL.
vs.
THE T. & P. RA'Y CO. } 6227.

Suit pending in the district court of Harrison County, Texas. Depositions and answers of D. B. Hearsey, of Dallas County, Texas, to the accompanying interrogatories in above cause, taken before A. Harwood, clerk district court of Dallas County, Texas, in accordance with the accompanying commission.

1st int'g. he answers: I am not occupied at present. I took charge of

the machinery department of the Texas and Pacific Ra'y Company in June, the 9th, 1873, and held that position till December, 1873. Since that time I have been engaged in the machinery and foundry business; was not in any *any* employ during the year 1874.

39 Ans'r to 2d int'g. I have worked as a machinist 25 years, and I was master mechanic on the Texas and Pacific Railway Company.

Ans'r. to 3rd int'g. I had sole charge of all the rolling stock on the road, and it was my duty to keep it in proper repairs.

Ans'r. to 4th . The use of a pilot or cow-cat'her is attached to the front of a locomotive, to throw off all obstructions that may be on the track. Where the road is perfectly smooth and level it should be run within three inches of the rail. Under the circumstances I am not able to give an average.

Ans'r. to 5th int'g. The pilot should be fastened immovably to the engine.

Ans'r. to 6th int'g. The locomotives of defendant were known by numbers.

Ans'r. to 7th int'g. The defendant had a locomotive known as No. 4 on the track. I don't know the height of the pilot on locomotive from the track while running. It was built at Pittsburg.

Ans'r. to 8th int'g. I don't know anything about the pilot the
40 engine had on at the time of the accident.

Ans'r. to 9th int'g. Not having any connection with the company at that time, I am unable to make a statement in regard to the pilot of any of the engines.

Ans'r. to 10th int'g. Some whistles are screwed into the dome of the boiler, and some are bolted fast with a flanged joint. It depends on what kind of a hard substance it might strike whether it would be broken or not.

Ans'r. to 11th int'g. It is an uncommon occurrence for the whistle to be blown out.

Ans'r. to 12th int'g. I do not recollect of any ever being blown out.

D. B. HEARSEY.

Ans'rs to X Interrogatories by D. B. Hearsey.

Cross-interrogatories.

To 1st X Int'g. I commenced as an apprentice 25 years ago, and have worked in all the different departments in connection with the locomotive engines.

To 2nd X Int'g. The mode I adopted was to bolt the pilot fast to the buffer or *u*sill of the engine and braced from boiler and frame
41 of engine, and should be on a good road placed three inches from the rail.

To 3rd X Int'g. My duties and responsibilities were to look after and see that the locomotives running on the roads were kept in proper repair. They were. I never allowed him to interfere.

To 4th X Int'g. It is generally. We kept no report book of the work done, but kept a register of the time of the arrivals of the engines. It was turned over to my successor. The engineer of No. 4 did not report to me, as he was not running that engine during my supervision.

To 5th X Int'g. I don't know or recollect the condition of it at the time I left.

To 6th X Int'g. I don't recollect of ever condemning locomotive No.

4. I don't recollect any changes I desired to make on that particular engine. He did not.

To 7th X Int'g. The whistle is usually screwed into the top of the dome. The whistle on engine No. 4 was screwed into the cap of the dome of the boiler.

42 To 8th X Int'g. It was possible for it to be knocked off if it struck a stump.

To 9th X Int'g. My employment commenced June 1st, 1873, and ended December, 1873. I resigned. I was not discharged for incompetency. I am on the very best terms with all the officers.

To 10th X intg. I knew Wentworth C. Hough; he was an engineer under my direction, and run engine No. 23 while I was there.

D. B. HERSLEY.

THE STATE OF TEXAS,
Dallas County:

This certifies that the above answers of the witness D. B. Hearsey were taken before me, and were sworn to and subscribed before me by the said witness this 11th day June, A. D. 1875.

Witness my official seal and signature, at my office in Dallas, this the day & date last above written.

[SEAL.]

A. HARWOOD,
Clerk D. C. D. C., Texas,
By W. L. REEVES, *D'y.*

Filed 12th June, 1875.

W. C. PIERCE,
Clerk.

43 STATE OF TEXAS,
County of Harrison:

To any public officer of the county of Suffolk, State of Massachusetts, having under the laws of said State authority to take depositions:

Know ye, that reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and all means, at such times as you may appoint, Henry Leach, and that you then and there carefully examine him, upon oath first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce or cause to be reduced his answers so taken to writing in proper form, the same to be subscribed and sworn to in your presence by said witness.

2nd. That you certify under your hand and seal of office that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

44 4th. That you endorse on the envelope the names of the parties to this suit, and the name of the witness, directing it to the clerk of the district court of Harrison County, Texas.

5th. That, if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent *sent* by private conveyance the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession and undergone no alteration, which answers when so taken will be used as evidence on the trial of a certain cause no' pending in our

said district court of Harrison County, wherein Annie Hough et al. is plaintiff, and the Texas and Pacific Railway Company is defendant.

Herein fail not, and return make.

Test: W. C. Pierce, clerk of the district court of Harrison County, and seal of said court, at Marshall, this 18th day of December, 1875.

[SEAL.] W. C. PIERCE,
Clerk District Court Harrison County.

Direct Int'g's to Henry Leach.

ANNIE HOUGH ET AL. }
vs.
THE T. & P. R'W'Y CO. }

Suit pending *pending* in the district court, April term, 1875.

Interrogatories to be propounded to Henry Leach, a citizen of Suffolk County, State of Massachusetts, to be read in evidence on the trial of said cause:

Intg. 1st. Do you know the parties to this suit, either or both of them?

Intg. 2d. What is your occupation, and if you state you have an occupation, then state how long you have followed said occupation?

Intg. 3rd. If in answer to the 2nd interrogatory you say that you are a car-builder or a locomotive builder, then state how that portion of the engine called the steam whistle is constructed, and how it is fastened on or into the locomotive. Give a full and perfect statement of the construction and fastening of the steam whistle as you can.

Intg. 4th. If in answer to 3d interrogatory you say that the steam whistle is let into a piece of cast iron called the dome-cap, then
46 state how said dome-cap is fastened with the boiler and how thick said dome-cap is at the place where said steam whistle enters the dome-cap; state, if you can, how many threads to the inch there is or should be on all properly constructed steam whistles, and how many inches each properly constructed steam whistle should be let into the dome-cap.

Intg. 6th. If you say that you are a professional locomotive builders and that you have followed that business for a number of years, then state whether said steam whistle would be easily displaced by concussion or by pressure of the steam on the inside of the boiler, and would the throwing of the locomotive from the track, and turning the locomotive over into a ditch, cause the steam whistle to be blown out or displaced in such a manner as to let the steam from the boiler escape upon the engineer.

Intg. 7th. If in answering the sixth interrogatory you say that the turning of a locomotive over, and throwing it off of the track into
47 the ditch would not necessarily cause the steam whistle to blow out, then state from your knowledge whether *whether* it is a common or uncommon occurrence for the steam whistle to blow out if properly put in.

Intg. 8th. If in answer to seventh interrogatory you say that it is an uncommon occur'ence for the steam whistle to blow out, then state if you can, from your own knowledge, how many times, in your experience, you have known the steam whistle of the locomotives to blow out.

Intg. 9th. If in answering any of the foregoing interrogatories you say that you are a locomotive builder, then state if you know whether the boiler is weaker or stronger where the steam whistle enters the dome

cap than at any other point, and state whether there is any material difference in the mode of fastening the steam whistle into the boiler in the different styles of locomotives now in use in the United States. If yea, state the difference.

TURNER AND LIPSCOMB, AND
GEORGE L. HILL,
Att'ys for Pl'ff's.

48 *Cross-int'g's to same witness.*

Cross-interrogatories propounded by defendant to Henry Leach, a witness of the plaintiff's.

X Intg. 1st. If you say you are acquainted with the manner in which the steam whistle is fastened into the dome cap of a locomotive, please tell if there is more than one way of fastening the whistle into the dome cap; if so, please describe fully each mode, if you say there is more than one.

X Intg. 2d. If you say you are acquainted with the modes in which the steam whistle of a locomotive is fastened on or into the dome cap of a locomotive, and if you say that it is an unusual occurrence for a steam whistle to be blown off or out of the dome cap, please say if it would be impossible for a steam whistle to be torn off or out, or to be so badly injured as to allow steam to escape, if the locomotive to which said whistle was attached was thrown off the track and down an embankment ten feet in height, and said whistle and the dome cap, to
49 which it was attached, thrown violently against or upon a stump, even though said whistle were constructed and fastened on and into the dome cap on the very best plan?

X Intg. 3rd. Do you know anything about the locomotive engine No. 4, of the Texas and Pacific Railway Company, having its principal office at the city of Marshall, Texas, and do you know anything of the condition of said locomotive on the 8th day of March, 1874?

X Intg. 4th. Do you know anything (of your own knowledge) of the circumstances set forth in the plaintiff's petition in this case? and in which she charges, resulted in the death of her husband.

STEDMAN AND SEXTON,
Att'ys for Def't.

THE STATE OF TEXAS,
Harrison County:

I, William C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true and correct copy of the original direct and cross-interrogatories as filed in the case of Annie E. Hough et al. vs. The Texas and Pacific Railway
50 Company. No. 6227.

In testimony whereof I have hereunto signed my name and affixed the seal of my office, at the city of Marshall, this December, A. D. 1874.

[SEAL.]

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *Jan'y 11th*, 1875.

I, Benjamin Kemball, justice of the peace for Suffolk County, do here-

by certify that in obedience to the annexed commission, issued from the district court of Harrison County, Texas, in case No. 6227, styled Annie E. Hough et al. vs. The Texas and Pacific Railway Company, I caused to come before Henry Leach, the witness named in said commission, whose full name on examination proved to be Henry L. Leach, and it appearing, upon investigation, that there was no other person to whom the description would apply, and after being duly sworn to tell the truth, and nothing but the truth, in answer to the interrogatories
51 propounded to him, and attached to the said commission, said witness answered as follows:

Ans'rs to direct interrogatories.

1st intg. He answers: I do not.

2d intg. He answers: Locomotive builder. I have followed the occupation thirty years.

3d intg. He answers: It is made of bars, and consists of the parts called a bell cup and valve; the lower portion forms a stud or screw, and is usually screwed into the dome-cap of the boiler, or is screwed into a stud, which stud is screwed into the dome-cap; its construction is shown more in detail by the plan annexed, which I make part of this answer.

4th intg. He answers: The dome-cap is fastened to the dome by bolts through the flange of the dome-cap, into the top of the dome of the boiler. The dome-cap is one and one-quarter inches thick where the dome-cap is screwed in. Our whistles have ten threads to the inch where screwed into the dome cap, or slight variation from that
52 number does not make any material difference in *in* the strength.

To 6th intg. He answers: The steam whistle would not be easily displaced by concussion or by pressure of steam on the inside of the boiler, and the throwing the engine from the track and into a ditch would not be likely to cause the whistle to blow out, if the whistle itself did not hit anything, I do not think the steam from the place where a whistle had blown out would be likely to escape upon the engineer.

To 7th intg. He answers: It is a very uncommon thing for a whistle to blow out.

To 8th intg. He answers: I have never known or heard of one being blown out.

To 9th intg. He answers: I should say that it was stronger; that at most other points there is a difference in the work of fastening the whistle to the boiler, but the method described in the answer to the 1st interrogatory is the one usually adopted.

Ans'rs to cross-interrogatories.

To 1st X intg. He answers: I know of but one way by which the whistle is fastened to the dome-cap.

53 To 2d X intg. He answers: It is of frequent occurrence that a steam-whistle is hit or broken or torn out, when the engine is thrown from the track and tip'ed over, and it could not well be constructed or fastened as to prevent such occurrence when an engine is thrown over into a ditch.

To 3d X intg. He answers: I know nothing of the engine No. 4, on the Texas and Pacific Railroad, or of its condition at that date.

To 4th X intg. He answers: I know nothing of the circumstances set forth in the petition of the plaintiff in this case.

HENRY L. LEACH.

COMMONWEALTH OF MASSACHUSETTS,
Boston, Jan'y 11th, 1875.

I, Benjamin Kemball, justice of the peace for Suffolk County, do hereby certify that the foregoing answer to the direct and cross interrogatories propounded to Henry Leach, and accompanying the annexed commission, were by the said Henry L. Leach signed, subscribed, and sworn to before me this day.

To certify which I have hereto set my hand and affixed the seal
54 of my office on this eleventh day of January, A. D. 1875.

[SEAL.] BENJAMIN KEMBALL,
Justice of the Peace. Office 27 Court st., Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS,
Secretary's Department, Boston, Jan'ry 11th, 1875.

I hereby certify that on the thirty-first day of July, 1873, Benjamin Kemble was appointed, and commissioned on the fifth day of August, 1873, duly received the qualifying oaths thereunder as a justice of the peace for the county of Suffolk in the said commonwealth for the term of seven years from the date of said commission, and that to his acts and attestations as such full faith and credit are and ought to be given in and out of our court.

In testimony of which I have hereunto affixed the seal of the commonwealth.

[SEAL.] BENJ. C. PIPER,
Dep'ty Secretary of the Commonwealth.

Filed 20th January, 1875.

W. C. PIERCE,
Clerk.

55 STATE OF TEXAS,
County of Harrison:

To any public officer of the parish of Cad'o and State of Louisiana having authority under the laws of said State to take depositions:

Know ye that, reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you by any and all means, at such time as you may appoint, Louis A. Lord, and that you then and there carefully examine him upon oath, first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce or cause to be reduced his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2d. That you certify, under your hand and seal of office, that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

56 4th. That you endorse on the envelope the names of the parties to the suit and the name of the witness, directing it "To the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our

said court and there make oath that they have not been out of his possession and undergone no alteration, which answers, when taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough et al., plaintiff', and The Texas and Pacific Railway Company is defendant.

Herein fail not, and return make.

Test, W. C. Pierce, clerk of the district court of Harrison County, and seal of said court, at Marshall, this *this* 20th day of March, 1875.

W. C. PIERCE,
Clerk Dist. Court Harrison Co.,
By A. POPE, *Deputy.*

(Endorsed:) Com's'n issued 20th March, 1875. W. C. Pierce, clerk, by A. Pope, dep'ty.

57 *Direct int'g to L. A. Lord.*

District court, May term, 1875.

ANNIE HOUGH ET AL.
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

THE STATE OF TEXAS,
Harrison County:

Interrogatories to be propounded to Louis A. Lord, a resident citizen of the parish of Caddo, State of Louisiana:

Intg. 1st. Do you know the parties to this suit, or either of them?

Intg. 2d. Were you on a train of passenger cars on the Texas and Pacific Railway which left Shreveport on the afternoon of the 8th day of March, 1874, bound west or towards Marshall? If yea, please state if you know who was engineer and who was conductor of said train. State, if you know, the name or number of the engine which pulled said train of cars of said train. Were you at said time, and in what capacity or position were you acting on said train?

Intg. 3d. If, in answer to interrogatory 2d, you say you were on a train of passenger cars on the defendant's railway at the time in-
58 dicated, please state if any accident of any kind befell or happened to said train before it reached Marshall. If yea, please describe fully the nature and circumstances of said accident; please tell the place where and the time when said accident happened, and described what caused it, and say who was injured thereby if you know.

Intg. 4th. If in answering interrogatory 3d you say that the passenger train No. 1 on the defendant's railroad, which left Shreveport on the afternoon of the 8th March, 1874, bound west, was thrown from the track by a bull or other animal, please state accurately, if you know, where and at what part of said train said bull or other animal struck, and give your means of knowledge. If you say that said bull struck any part of the engine which pulled said train, please state particularly and accurately where and at what part of said engine said bull or other animal struck.

Intg. 5th. If you say that you were on the train referred to, and at the time referred to in previous questions, and if you say said train
59 was thrown from the track of the defendant's railway by being struck by a bull or other animal, please state if after the happening of said occurrence you made any examination to satisfy yourself

thoroughly as to the manner and place in which said bull or other animal struck said train; and, if so, state fully the extent of your examination, and what you found, and where you found the same.

STEDMAN AND SEXTON,
Att'ys for Def't.

Cross-int'g's to L. A. Lord.

Cross-interrogatories.

1st X Intg. If in answer to 1st direct interrogatory you say that you know the defendant, then state were you ever in the employ of the defendant, and what is your occupation at this time.

2d X Intg. If in answer to direct interrogatory 2d you say that you were on a passenger train which left Shreveport on the afternoon of the 8th March, 1874, then state in what capacity were you on said train; that is, were you a regular passenger on said train or were you on said train as one of the employees of the defendant?

60 3d X Intg. If in answer to 4th direct interrogatory you say that said train was struck by a "bull or other animal," then state particularly what said bull or other animal struck said train with, and where did said bull or other animal strike said train, in front or behind; where did said bull or other animal stand when he struck said train, on the track or off of it, and how came said bull or other animal to strike said train? State fully and particularly all you know about this matter. And if in answer to said 4th interrogatory you say that said train was thrown from the track by a bull or other animal, threw said train off of said track, was it with the head or feet of said bull or other animal?

3rd X Intg. If in answer to 5th direct interrogatory you said you did make an examination as to the cause and nature of said *said* accident, then state at whose instance you made said examination, and how did the defendant in this suit find out about your making said examination, and about what you know about this case?

61

GEO. L. HILL &
TURNER & LIPSCOMB,
Att'ys for Plaintiff.

THE STATE OF TEXAS,
Harrison County:

I, W. C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true and correct copy of the original direct interrogatories as now on file in my office.

Test: W. C. Pierce, clerk dist. court of Harrison County, and seal of same, at office, Marshall, this 20th March, 1875.

W. C. PIERCE, *Clk.*
By A. HOPE, *D'p'ty.*

Issued 20th March, 1875.

W. C. PIERCE, *Clerk.*

Ans'rs of L. A. Lord to direct interrogatories.

Testimony of Louis A. Lord.

ANNIE HOUGH ET AL.
vs.
TEXAS AND PACIFIC RAILWAY.

THE STATE OF LOUISIANA,
Parish of Caddo:

By virtue of the annexed commission, I, F. A. Leonard, a commissioner

of deeds for Texas, in Caddo Parish, Louisiana, caused to appear before me Lewis O. Leonard, the witness mentioned in said com-
62 mission, and after having administered the oath him, proceeded to take his answers to interrogatories in said suit, which were as follows:

To intg. 1st. I am not personally acquainted with any of the parties to this suit.

To int. 2d. I was on the passenger train that left Shreveport Saturday, the 8th day of March, 1874, bound west or towards Marshall, Tex. I was not personally acquainted with the engineer, but knew him by sight, having seen him often on or about his engine at the station at Shreveport, and knew from others that his name was Hough—Charles, I believe; I saw him on the engine just before we left Shreveport, and several times, up to the accident. The conductor was a stranger to me, it not being his regular train, and I do not remember that I ever saw him before meeting him at the train on the 8th March. I do not remember the name or number of the engine that pulled the train at the time of the accident, &c.; I was where my business called me, in the car next to the engine, used in common for mail, express, and
63 through baggage; I was acting in the capacity of mail agent that day.

To intg. 3d. Everything passed off all right until we got about half the distance between Jonesville and Scutterville, when the train ran over a bull, which threw the engine from the track, thereby causing the death, the next morning, of the engineer, Charles Hough. A few moments before, and at the time the engine struck the bull, I was standing in the side door of the car, next to the engine, and I observed an animal at the side of the track, pawing the dirt, seemingly anxious for a fight; and as the train advanced he walked toward the track, and I, seeing that if he kept on, we were bound to strike him, and told the express messenger so, and hearing no signal from the engine of danger, I looked forward and saw the engineer on his seat or box, on the right of the train, but did not see the engineer, whose position for lookout was on the side from which the danger was approaching, whom I supposed was, I afterwards learned, attending to his fires; as I got back to the said door of
64 the car on the left side of going west toward Marshall, the animal was only about forty or fifty feet ahead of the train, standing on the side of the track, looking at the approaching foe, and as I saw it, I hallooed at the engineer at the top of my voice; but just then the train came up with him, and as the front trucks of the engine passed, he made a lunge at the machine and went between the front trucks and the fore-driver, on the left side of the train. The train was moving uncommonly slow at the time, for what reason I do not know, and, consequently, I had an opportunity to study every move of the animal; I heard no alarm sound until we were on the top of the animal, and then it was too late, for the mischief was all done; this all occurred about three and a half or four miles beyond Jonesville, Tex., going from Shreveport, La., to Marshall, Texas, it being full daylight, about 6 or 6½ p. m.; after the excitement was over we were discussing the accident, and I gave my reason as I saw it; and some knowing individual said it was im-
65 possible; and I made up my mind to go and look for myself; so with a lantern (as it was at that time dark) I went to the engine and examined the cow-catcher, the fore-trucks, and the drivers, and the first evidence of blood, hair, or anything to show I saw was upon the forward left-hand driver of the engine; it was in the shape of clotted hair and blood, which, with what I had already seen, settled it in my mind

that the accident happened as I first said it did, and nothing on earth could or can change my opinion.

LOUIS O. LORD.

Sworn to and subscribed before me, at Shreveport, La., this April 9th, 1875.

F. A. LEONARD,
Commissioner of Deeds for Tex., in Caddo Parish, Louisiana.

Answers to cross-int'g's by L. O. Lord.

Ans'r 1. X Intg. I am not personally known to the defendant, neither was I ever in their employ, and at present I am doing nothing.

Ans'r to 2d X. Intrg. I was on the passenger train from Shreveport, La., to Marshall, Tex., in the capacity as mail agent for the regu-
66 lar mail agent, whose place I was filling to the extent of my size and capabilities, and in no other way connected with the def't.

Ans'r to 3d intg. The bull or animal, as you call it, was standing on the side of the track as the train approached him, and made a lunge at the machine as the forward trucks passed him, and he brought up under the front driver, in rear of trucks, on the left side of the engine, and from the appearance of the brute, it was a self-evident fact that he neither struck it with his head or his heels, but run under the wheels, thereby causing the engine to capsize.

To X intg. 3rd. All the examination I made *I made* were to satisfy a curious nature, never dreaming I would be called upon to give my testimony for or against either party. I suppose defendants found out what information they obtained by asking, as I always have been free and willing to give all the information I could on the subject, and if I was questioned once, I expect I must have had to tell my story twenty times.

LOUIS O. LORD.

67 Sworn to and subscribed before me, at Shreveport, La., on this the 9th April, 1875.

[SEAL.] F. A. LEONARD,
Commissioner of Deeds for Texas, in Caddo Parish, La.

I certify that the above answers to interrogatories and cross-interrogatories, signed by the witness Lord, was sworn to and subsc'ibed before me.

Witness my hand and seal of office, at Shreveport, La., this 9th April A. D. 1875.

[SEAL.] F. A. LEONARD,
Commissioner of Deeds for Texas, in Caddo Parish, La.

STATE OF TEXAS,
County of Har'ison :

To any public officer of the county of Clinton, State of Iowa, having under the laws of such State authority to take depositions :

Know ye that, reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and all means, at such time as you may appoint, C. C. Elliott, and that you then and there carefully examine him upon oath, first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State :

68 1st. That you reduce, or ca'se to be reduced, his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2d. That you certify, under your hand and seal of office, that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit and the name of the witness, directing it "To the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession, and undergone no alteration, which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in
69 our said district court of Harrison County, wherein Annie Hough et al. are plaintiffs and The Texas and Pacific Railway Company is defendant.

Herein fail not, and return make.

Test, W. C. Pierce, clerk of the district court of Harrison County, and seal of said court, at Marshall, this 18th day of Dec'r, 1874.

W. C. PIERCE,
Clerk Dist. Court Harrison County.

(Endorsed:) Commission issued 18th Dec'r, 1875.
W. C. PIERCE, *Clerk.*

Direct int'g's to C. C. Elliott.

ANNIE HOUGH ET AL.
vs.
THE T. & P. RA'Y CO. } 6227.

Suit pending in the district court. April term, 1875.

Interrogatories to be propounded to C. C. Elliott, a witness who lives in the county of Clinton, State of Iowa, to be read in evidence on the trial of said cause.

Intg. 1st. What is your age and occupation?

2nd intg. If in answer to 2d interrogatory you say you are a ma'ter mechanic, then state what your duties are as such master mechanic.

3rd intg. If in answer to 2d interrogatory you say your
70 duties are to repair and keep in running order locomotives on any railroad in the United States, then state what road, its length, and the number of locomotives now in use on said road.

4th intg. Have you ever had any experience in the constructing and repairing of locomotives? If yea, state your experience, on what roads, and how many locomotives have you had under you charge as such master mechanic.

5th intg. If you say that you have been engaged as a master mechanic for a number of years in the repairing of locomotives, then state, if you can, how the steam-whistle is fastened to or into the locomotive.

6th intg. If in answer to 5th interrogatory you say that the steam-whistle is screwed into the boiler through the dome-cap, then state how thick the dome-cap is, and whether the steam-whistle could be easily blown or knocked out of the dome-cap by the engine being thrown off of the track and striking against any hard substance.

71 7th intg. If in answering the foregoing interrogatories you say that if the steam-whistle is properly put in that it could not be easily blown or knocked out, then state whether it is a common or uncommon occurrence for the steam-whistle of a locomotive to be blown out if properly put in.

8th intg. If in answering the foregoing interrogatory you say that it is an uncommon occurrence for the steam-whistle of a locomotive to blow out if properly put in, then state, if you can, how many times in your experience you have known the steam-whistle of a locomotive to blow out when the steam-whistle had been properly put in at first.

TURNER AND LIPSCOMB,
GEO. L. HILL,
Att'ys for Plaintiffs.

Cross-int'g'r's.

Cross-interrogatories propounded by defendant to C. C. Elliott, a witness for plaintiff.

1st X Intg. If you say you are acquainted with the manner in which the steam-whistle is fastened into the dome-cap of a locomotive,

72 please tell if there is more than one way of fastening the whistle into the dome-cap; if so, please describe fully each mode, if you say there is more than one.

2d X Intrg. If you say you are acquainted with the mode or modes in which the steam-whistle of a locomotive is fastened on or into the dome-cap of a locomotive, and if you say that it is an unusual occurrence for a steam-whistle to be blown off or out of the dome-cap, please say if it would be impossible for a steam-whistle to be blown off or out of the dome-cap, or to be so badly injured as to allow steam to escape, if the locomotive to which said whistle was attached were thrown off the track and down an embankment ten feet high and said whistle and the dome-cap to which it was attached thrown violently against or upon a stump, even though said whistle was constructed and fastened on and into the dome cap on the very best plan.

3rd X Intg. Do you know anything about the locomotive engine No. 4 of the Texas and Pacific Railway Company, having the princi-

73 pal office at the city of Marshall, Texas, and do you know anything of the condition of said locomotive on the 8th day of March, 1874?

4th X Intg. Do you know anything, of your own knowledge, of the circumstances set forth in the plaintiff's petition in this case, and which she charges resulted in the death of her husband?

5th X Intg. If you say you are a master mechanic, state whether or not you are a practical machinist. How long have you been engaged as a master mechanic, and where? If you say you are a practical machinist, please say how long you acted as such before being appointed a master mechanic.

STEDMAN AND SEXTON,
Att'ys for Defendant.

THE STATE OF TEXAS,
Harrison County:

I, William C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true and correct copy of the direct and cross interrogatories now on file in my office, in the case of Annie Hough vs. Texas and Pacific Railway Company,
74 No. 6227.

In testimony whereof I have hereunto signed my name and affix the seal of said court, at Marshall, Dec'r 18th, A D. 1874.

[SEAL.] W. C. PIERCE, *Clk*,
By A. POPE, *Dep'ty.*

Answers of C. C. Elliott to direct int'g's.

STATE OF IOWA,
Clinton County:

I, W. W. Stevens, a notary public in and for said county, do hereby certify that, in obedience to the annexed commission, issued from the district court of Harrison County, in the State of Texas, I caused to come before me C. C. Elliott, the witness named therein, and, after swearing him to speak the truth, the whole truth, and nothing but the truth, in answer to the interrogatories and cross-interrogatories propounded to him, he, the said witness, answered thereto as follows:

To 1st intrg. he answers: My name is Charles Elliott; age, 43; occupation, master mechanic.

To 2nd intrg. he answers: My duties are to repair and keep in repair and running order locomotives under my charge on the railroad
75 on which I am employed in the State of Iowa.

To 3rd intg. he answers: Chicago and Northwestern Railway, Iowa division. Its main line and branches are about four hundred miles in Iowa. The No. of locomotives now in use on said division of said road are eighty-two (82).

To 4th intrg. he answers: I have had experience in repairing locomotives (but not in constructing locomotives) as master mechanic on the above-named road for eleven years; eighty-two locomotives.

To 5th intrg. he answers: Some of them are fastened on with a ball joint and flange, with bolts or studs, and others are screwed into the dome cover.

To 6th intrg. he answers: The dome cover or cap is about an inch and one-half thick. If properly put in and kept in repair, it could not be easily blown out or knocked out of the dome cap or cover by the engine being thrown off the track and striking any hard substance.

To 7th intg. If properly put in, it is not a common occurrence
76 for steam-whistles to be blown or knocked out.

To 8th intg. he ans'rs: I never knew a steam whistle blown out when properly put in.

Ans'r to X int'g'r's by C. C. Elliott.

To 1st X Intg. he ans'rs: There are two ways to my knowledge in which to fasten steam-whistles to the dome cap; one is to fasten them on with ball joints and flange with studs or bolts; and the other is to screw them into the dome cover or cap.

To 2d X Intg. he ans'rs: It would be impossible.

To 3rd X Intg. he ans'rs: I know nothing about engine No. 4 of the

Texas and Pacific Railway Company, nor anything about its condition on the 8th day of March, 1874.

To 4th X Intg. he ans'rs: No.

To 5th X intg. he ans'rs: I am a practical machinist; was a practical machinist 9 years before I was appointed master mechanic. I have been engaged as a master mechanic for eleven years in Michigan and Iowa.

C. C. ELLIOTT.

Subscribed by the said C. C. Elliott in my presence, and by him sworn to before me this 8th day of April, A. D. 1875.

W. W. STEVENS,
Notary Public.

77 THE STATE OF IOWA,
Clinton County:

I, W. W. Stevens, a notary public in and for said county, do hereby certify that the foregoing answers of C. C. Elliott were by said witness subscribed, signed, and sworn to before me on the 8th day of April, 1875, to certify which I have hereunto signed my name and affixed the seal of my office on this 8th day of April, 1875.

[SEAL.] W. W. STEVENS,
Notary Public.

Filed 14th April, 1875.

W. C. PIERCE, *Clerk*,
By A. C. MARTIN, *Deputy*.

THE STATE OF TEXAS,
Harrison County:

To any notary public of the county Harrison, or the district clerk of said county:

Know ye that, reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and all means, at such time as you may appoint, James McMillan, and that you then and there carefully examine him upon oath, first taken before you, touching the annexed interrogatories, observing the follow-
78 ing requirements of the law of this State:

1st. That you reduce or cause to be reduced his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2nd. That you certify under your hand and seal of office that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit, and the name of the witness, directing it "to the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our said court and there make oath that they have not been out of his pos-
session, and undergone no alteration, which answers, when so
79 taken, will be used as evidence on the trial of a certain cause now

pending in our district court of Harrison County, wherein Annie Hough et al. are plaintiffs and Texas and Pacific Co. is defendant.

Herein fail not, and return make.

Test, W. C. Pierce, clerk of the district court of said county, and seal of the same, at Marshall, this 9th day of March, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

(Endorsed:)
Issued 9 March, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Dept.*

Direct int'g's to Jas. McMillan.

ANNIE HOUGH ET AL.
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Suit pending in the district court of Harrison County.

Interrogatories to be propounded to James McMillan, who resides in Harrison County, Texas, but who is about to remove beyond the limits of said county, the answers to which will be read in evidence upon the trial of the above stated cause in behalf of the defendant.

80 Intg. 1st. Do you know the parties to this suit, and were you acquainted with Wentworth C. Hough?

Intg. 2d. What is your profession or vocation and how long have you pursued that profession or vocation?

3rd intg. Were you in the employment of any person or corporation on the 8th March, 1874? If yea, state in whose employment you were and in capacity you were so employed, and how long you were so employed.

4th intg. If you say that on the 8th March, 1874, and previous to that time you were foreman of the machine-shop of the defendant, then state what your *your* duties as such were.

5th intg. If, in answer to the preceding interrogatory, you say that it was your duty to inspect and examine the locomotives of the defendant, then state, if you know, the locomotive known as Number Four, belonging to the defendant; if yea, state whether or not you ever inspected or examined the said locomotive No. 4, previous to 8th March,
81 1874; and, if so, when did you so examine or inspect it, and how often? If you say you examined or inspected said locomotive, then state in what condition it was; state fully. Did you ever discover any defect in said locomotive? If yea, state in what that defect consisted.

6th int'g. If you say that you know Wentworth C. Hough, state what his profession and business was on the 8th March, 1874, and in what capacity. If you say that he was a locomotive engineer, and that on 8th March, 1874, he was in the employment of the defendant, as an engineer in charge of one of the locomotives of the defendant, then state *state* which of the defendant's locomotives he was in charge. If you say that he was in charge of locomotive No. 4, then state how long he had been in charge of said locomotive, and at whose instance he took charge of said locomotive. How long had said Wentworth C. Hough been in the employment of the defendant as a locomotive engineer? What locomo-

tive of defendant did he have charge of before he took charge of
82 said locomotive No. 4? and state whether or not he had any knowledge of locomotive No. 4 before he took charge of it? State also what were the duties of said Wentworth C. Hough, respecting said locomotive—between what points did he run it? If you state that one of the duties of said Hough was to report to you any defect in the locomotive of which he was in charge and which he ran, then state whether he ever reported to you any defect in the whistle or the construction of the pilot or any other defect in said locomotive No. 4. And, if so, when did he so report to you, and what defects did he so report?

7th intg. Did you know anything about the said locomotive No. 4 being thrown from the track of defendant's road? If yea, state when and where it occurred. State whether or not you visited the place where said locomotive was so thrown from said track, and, if so, when, in what condition did you find said locomotive No. 4. State also whether you then saw the whistle of said locomotive. If yea, where was it,
83 and in what condition was it? If you say that it had been knocked out of the locomotive, then state what caused it to be so knocked out. Do you know what became of said whistle? If yea, state what was done with it. If you say that it was placed at any particular point, state where that was, and what finally became of it.

8th intg. If you say that said locomotive No. 4 was thrown from the track of defendant's road about 8th March, 1874, and that you visited the wreck the evening of that day, then state if you then or afterwards made any examination of the whistle and whistle-hole of said locomotive. If yea, when and how often did you make such examination? Did you discover any defect in the fastening of the whistle to said locomotive? If yea, state what that defect was. Do you know how whistles are usually and properly fastened to locomotives? If yea, describe the proper and usual mode of their fastenings, and state the difference in the mode of the fastening of the whistle to the said locomo-
84 tive No. 4 and the usual and ordinary mode, if there was in fact any difference.

9th intg. State what your experience is respecting the construction of locomotive engines. How long have you been connected with them, and in what capacity? State also whether or not you are capable of judging of their construction.

10th intg. If there was a defect in the fastening of a whistle to a locomotive, when fastened according to the usual and approved mode, state whether or not such defect could be discovered by the usual and ordinary mode of examining the conditions of locomotives. State also how often locomotives that are in use are examined, and how often the said locomotive No. 4 was examined while Wentworth C. Hough was in charge of it. State also the mode and extent of such examination, and whether or not any defect in the fastening of the whistle could be learned by the exercise of any degree of diligence used in such examination.

85 11th intg. Suppose the whistle of a locomotive engine was held by only a few threads at the top of the whistle-hole, can you state what would be the effect of the ordinary motion of the engine upon the whistle? If you say that the effect would be that the whistle would jar loose or leak or blow out, then state how long after the engine would commence running before one of those results would follow. How long had locomotive No. 4 running before 8th March, 1874? Do you know whether or not its whistle ever leaked before that time? If it had leaked, state what the duty of the engineer in charge of it was

respecting said leak. If you say that it was his duty to report it to his superior officer, then state whether any such report was ever made by Wentworth C. Hough or any other person in regard to said locomotive No. 4.

12th intg. Do you know James A. Hough? If yea, state whether or not he made any report to you or complained to you of the
86 improper construction or defect in the construction of the whistle of locomotive No. 4, at or about or soon after it was thrown from the track as aforesaid. If yea, state what that report or complaint was.

13th intg. If you know any other matter or thing material to the issues between the parties to this suit which you have not stated in answer to the foregoing interrogatories, please state the same in answer to this.

C. F. B. SEXTON,
W. STEDMAN,
Defendant's Attorneys.

Cross-int'g's to McMillan.

Cross-interrogatories.

X Intg. 1st. In whose employment are you at this time, and in what capacity?

X Intg. 2d. If in answer to the foregoing you say that you are in the employ of the defendant in this suit in the capacity of a locomotive engineer, then state if you were ever foreman of the machine shops of the defendant; and, if so, then state how you came to be in your present position.

X Intg. 3rd. If, in answer to direct interrogatory, you say
87 that on the 8th of March, 1874, you were foreman in the machine shops of the defendant, then state how long you have held that position and what were your duties as such.

X Intg. 14th. If in answer you say you had charge of the engines and rolling stock of the defendant, then say how the whistle of the locomotive No. 4 was put on, and was the pilot of the said No. 4 put on as you would have had it put on had you had the No. 4 built in the shops of defendant; if, indeed, the defendant had an engine called the No. 4.

X Intg. 5th. If, in answer to direct interrogatory, you say that defendant had an engine called the No. 4, and that Wentworth C. Hough was the engineer in charge of said No. 4, then state if the pilot of said No. 4 was fastened or hung to the engine in a proper manner, that is, that you as a railroad man of experience would say that the No. 4 was safe and reliable on the 8th March, 1874; and do you not know from actual observations that the pilot of the said No. 4 was improperly hung to the engine?

88 X Intg. 6. If in answer to any of the direct interrogatories you say that you know the engine No. 4, then state how high the pilot of said engine was hung from the ground; and then state whether said pilot was too high or too low.

X Intg. 7th. How often have you, in your experience as a railroad man, known the whistle of an engine to blow out; is it not a very rare occurrence?

X Intg. 8th. The defendant asked you how long it would take a whistle held in by a few only of the top threads to jar out; did you ever in your life know a steam whistle to jar out of the engine so as to let the steam

escape? If yea, please give the times and places, as near as you can, and the number of times.

GEO. L. HILL AND
JAMES AND LIPSCOMB,
Attorneys for Plaintiffs.

I certify that the above and foregoing is a true and correct copy of the original direct and cross interrogatories now on file in my office.

Test, W. C. Pierce, clerk of the district court of Harrison County,
89 and seal of same, at office, this the 9th March, A. D. 1875.
[SEAL.] W. C. PIERCE, *Clerk*,
By A. POPE, *Dep'ty.*

Issued March 9th, 1874.

W. C. PIERCE, *Clerk*,
By A. POPE, *Dep'ty.*

Ans'rs to direct int'g'r's.

ANNIE HOUGH AND JAMES A. HOUGH
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Suit pending in the district court of Harrison County.

Answers and depositions of James McMillan, of Harrison County, Texas, to the accompanying interrogatories propounded to him in the above-entitled cause, taken before A. T. Smith, notary public, in accordance with the accompanying commission:

To 1st intg. he answers: Yes.

To 2d intg. he answers: Machinist and engineer, and have followed this profession about nineteen years.

To 3d intg. he answers: I was in the employ of the Texas and
90 Pacific Railway Company March 8th, 1874, as gen'l foreman of the Marshall shops from March 1st, 1874.

To 4th intg. answers: I had general charge, under the master mechanic.

To the 5th intg. answers: It was my duty to inspect the general work on engines that was reported by engineers, to see that the work was properly done. I knew engine No. 4; I did inspect and examine engine No. 4, and on the 7th day of March, 1874, when it left Marshall, it was in good condition, and I did not discover any defect in said engine No. 4 up to that date.

To 6th intg. answers: I know W. C. Hough; he was employed as an engineer on the Texas and Pacific Railroad and had charge of engine No. 4 on the 8th day of March, 1874. He had been in charge of engine No. 4 about two months; previously he had charge of engine No. 23. I do not know whether he had any knowledge of engine No. 4 before he took charge of it; he asked to have charge of engine No. 4 instead of No. 23. His duties were to examine his engine and to keep it
91 good repair and to report on his engine. He run between Shreveport and Jefferson. He never reported to me any defect in the whistle or the construction of the pilot or any other defect in engine No. 4.

To 7th intg. answers: No. 4 was thrown from the track near Scott's Crossing, and I visited the wreck the same evening. I found engine No. 4 lying on her right side in a ditch; her whistle was bent over and

torn out and a small stump lying against the whistle (to the best of my knowledge the stump knocked it out); the whistle was taken to the shop and placed at the brass lathe to be repaired for future use, but what became of it afterwards I do not know.

To 8th intg. answers: I did examine the whistle and whistle-hole. I made the examination at the wreck and in the shop. I did not discover any defect in the plan of fastening the whistle to the locomotive. I do know how whistles are fastened to locomotives; the proper and usual mode of fastening whistles to locomotives is to screw them
92 into the dome cap, as this one was fastened.

To the 9th intg. answers: I have had nineteen years' experience in locomotive machinery. I was engaged first as vice hand on the Little Miami Railroad; next on the Kansas Pacific as vice hand and acting foreman; then on the Texas Central Railroad as general foreman and division master mechanic; then on the Texas and Pacific as engineer and general foreman. I am capable of judging of the construction of locomotives.

To X intg. 10th answers: If there was a defect in the fastening of a whistle when fastened according to the usual and approved mode, such a defect could not be discovered by the usual and ordinary mode of examining the condition of locomotives. There is no general rule as to the examination of locomotives when in use, except that the engineer is required by the master mechanic to examine his engine at the end of each trip and report any defect; this rule was posted up in the Marshall shops and round house prior to March 8th, 1874.

93 11th intg. answers: If a whistle was held by a few threads it would be liable to jar loose and leak, and the engineer would be the first person to notice it and report it to the foreman or whoever has charge and have it fixed. I cannot say how long it would take to blow out. I do not know how long engine No. 4 had been running before March 8th, 1874. The whistle of engine No. 4 was never reported to be as leaking; if it had leaked it would have been the duty of the engineer in charge to report it to me.

To 12 intg. answers: If James A. Hough, the father of W. C. Hough, I do not know him. He made no report of complaint to me about the construction or defect in the whistle of No. 4 at or about or soon after it was thrown from the track.

To 13th intg. answers: I know nothing.

Ans'r of cross-int'g's by McMillan.

Answers to cross-interrogatories.

To 1st X int. he says: I am employed by the Texas and Pacific Railway Company as engineer.

94 To 2nd X intg. he says: I was general foreman of the I. and P. R'w'y shops. I resigned that position; the office was abolished, and I took an engine on the road.

To 3rd X intg. he says: I was foreman from March 1st, 1874, to October, 1874. My duties were as I have answered in direct interrogatories.

To 4th X intg. he says: The whistle of No. 4 was screwed into the dome cap in the usual manner. The pilot of No. 4 was put on just as I would have put it on.

To 5th X intg. he says: The pilot of No. 4 was fastened to the engine in a proper manner on the 7th March, 1874. No. 4 was safe and relia-

ble, and I saw her on that day, and to the best of my knowledge and belief No. 4 was safe and reliable on the 8th March, 1874.

To 6th X intg. he says: I do not know how high it was from the ground, but it was the general height. We set pilots from the rails.

To 7th X intg. he says: I never knew of a whistle being blown
95 out; it is a rare occurrence. I have known a whistle to leak, but it is at once reported and fixed.

To 8th X intg. he says: I have known whistles to jar loose and leak twice on the Kansas Pacific Railroad and once on the Texas Central.

JAMES McMILLAN.

THE STATE OF TEXAS,
Harrison County:

I, A. T. Smith, notary public, do hereby certify that the foregoing answers of James McMillan, the witness before named, were made before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and official seal this the thirteenth day of March, A. D. 1875.

A. T. SMITH,
Notary Public, Harrison County, Texas.

Filed 17th March, 1875.

W. C. PIERCE, *Clerk.*

THE STATE OF TEXAS,
Harrison County:

To the clerk of the district court of said county:

Know ye that, reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by
96 any and all means, at such time as you may appoint, James A. Hough, and that you then and there carefully examine him, upon oath first taken before you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce, or cause to be reduced, his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2d. That you certify under your hand and seal of office that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit, and the name of the witness, directing it "to the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his
97 name to such endorsement, officially. If sent by private conveyance, the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession and undergone no alteration. Which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough et al. are plaintiffs, and T. and P. R'w'y Company is defendant.

Herein fail not, and return make.

Test: W. C. Pierce, clerk of the district court of Harrison County, and seal of the same, at Marshall, this 6th day of January, 1875.

W. C. PIERCE,
Clerk Dist. Court Harrison Co.,
By A. POPE, *Dep'ty.*

(Endorsed:)
Commission issued 6th Jan'y, 1875.

W. C. PIERCE, *Clerk.*

Int'g's to Jas. A. Hough.

In the district court of Harrison, April term, A. D. 1875.

ANNIE HOUGH ET AL.
vs.
T. & P. R. R. COMPANY.

Interrogatories to be propounded to James A. Hough, a witness
98 for plaintiff, who resides in the county of Dodge, in *in* the State of Nebraska.

Intg. 1st. Do you know the plaintiffs, Annie Hough and James A. Hough? If you do, state what relation, if any, exists between yourself and said plaintiffs.

Intg. 2nd. Did you know Wentworth C. Hough in his lifetime? If yea, state what relationship, if any, existed between him and yourself; and if you say that he was your son, then state the age and occupation of your son; and if you say that he was an engineer and machinist, state the capacity and accomplishment of your son in his trade and profession. State also what was the value of his services when working at his trade.

Intg. 3d. If you say that you know the plaintiffs, state what relation they have to W. C. Hough; and if you say that Annie Hough was his wife, and James A. Hough is his child, give the age of the child. State, also, the circumstances of the said plaintiffs, and what means of
99 support have they now; and what means of support did they have in W. C. Hough's lifetime?

Intg. 4th. What is your age, and what is your trade, profession, or calling? And if you say that you are a machinist, state how long you have followed such calling; state fully your experience in the manufacture, construction, repairing, and working of machinery; and if you have been engaged for any length of time, either in the construction, repair, or working of locomotive engines, state how long, where, and the extent of your experience; state, also, whether you have ever had such engines under your management or control, and what number; state generally and fully your experience in the construction, repair, and operation of such engines.

Intg. 5th. When and where did you last see W. C. Hough before his death? State what his condition was when you saw him, and the cause of his death. If you know, state also where, by whom, and how he was employed immediately before his death.

100 Intg. 6th. If you have before said that W. C. Hough was killed while in the service of the defendant in this suit, and that he was burned or scalded to death, then state whether you was present when he was so injured; and, if not, how long was it after the injury before you saw him?

Intg. 7th. Do you know when and how the injury was occasioned of which your son died?

Intg. 8th. If you say that he was injured by an engine being thrown from the track, and that your son was the driver in charge of the engine, state, if you can remember, the number of his engine.

Intg. 9th. Did you, after your son was injured, make any examination to discover the occasion or cause of the injury? and if you did, state where you found the engine, and in what position and condition you found it; state also whether you found any of your son's on or about the engine; and if you did, what position of his clothing, and where you found it.

Intg. 10. If you have before said that your son was burned or scalded to death, state, from any examination you may have made, how he was injured; and if you say it was by the escape of steam from the engine, then state from what portion of the engine the steam escaped.

101 Intg. 11th. If you have before stated that the steam escaped from the dome cap, or from the hole where the steam-whistle is inserted, state particularly the condition in which you found such dome cap or hole, and how it was that the steam could escape from it.

Intg. 12th. Will you please explain how the steam-whistle is fastened to or inserted in an engine, and whether you have had experience, and are familiar with the construction and fastening of that portion of an engine? State, also, from any examination you may have made, the construction and fastening of the whistle in this particular engine.

Intg. 13th. From the examination you have made of this particular engine, state whether there was any defect or fault in the construction and fastening of the steam-whistle; and if you say there was, then state paticularly and fully in what it was defective; state, also, or explain the difference, if any there was, in the construction and fastening of

102 this and a properly constructed and fastened whistle.

Intg. 14th. If you have before stated that the whistle is secured into the dome cap of an engine, explain as thoroughly as you can the construction of both dome cap and whistle. Also, how the steam passes from the boiler to the whistle. State, also, and explain whether the boiler is weakened in any manner by the insertion of the whistle.

Intg. 15th. If you have before answered that you are a practical machinist and familiar with the construction of engines and their use and operation, state how often you have ever known the steam-whistle to be blown or knocked out of a properly constructed engine.

Intg. 16th. In a properly constructed engine, what is the relative strength of that portion of the boiler in which the whistle is fastened, compare' with other portions of the boiler?

Intg. 17th. When the steam-whistle is properly attached to a boiler, is it easy or difficult to blow out? Give your opinion on this sub-

103 ject, and the reasons upon which you base it.

Intg. 18th. If you ever examined the engine upon which your son was killed and the whistle and the manner of its fastenings to the boiler, explain if you please what defect, if any, you discovered in the whistle or its fastenings; and if it was blown or knocked out, the reasons why it came out.

Intg. 19th. Was there a pilot or cow-catcher attached to the engine? If there was, explain the manner in which it was attached. State, also, how high above the track the cow-catcher would be when the engine was in motion.

Intg. 20th. Was there any defect or fault in the construction and fastening of the pilot or cow-catcher? If yea, explain what and wh rein

consisted the defect, and explain whether the defect, if any existed, would make the engine more or less liable to be thrown from the track when any object was upon the road.

Intg. 21st. Did you examine to ascertain the cause of the en-
104 gine being thrown from the track? If yea, state what it was, if you know, and if you say it was a bull, steer, or cow, state where the animal or its remains was when you saw it.

Intg. 22d. If you have stated that W. C. Hough was dead, state whether you were with him at and before his death, and after he had been hurt; and if you were there state what he said, if anything, about how the engine happened to be thrown from the track. State fully and particularly what he said upon the subject; also, what he said, if anything, about how he came to get hurt, and how long he remained on the engine after it was thrown from the track, and why he remained there. State, also, how long the conversation occurred before his death.

TURNER AND LIPSCOMB,
Att'ys for Plaintiffs.

Cross-interrogatories propounded to James A. Hough, by the defendant.

X Intg. 1st. If, in answer to direct interrogatory 4, you say that you have been engaged in the construction, repair, or working of lo-
105 comotive engines, state on what railroad or railroads you have worked, and give the name or names and residences of any person or persons who worked with you or who are acquainted with the character of your work, and know the length of time which you have been engaged in the construction, repair, or working of locomotive engines.

X Intg. 2d. If, in answer to direct interrogatory 10, you say that W. C. Hough was scalled to death by the escape of steam from a locomotive engine, please state how you know that fact. Were you present when he received the injury of which he died?

X Intg. 3rd. If, in answering direct interrogatory 12, you undertake to explain how the steam-whistle is fastened into the boiler of a locomotive engine, please say if more than one method of fastening the steam-whistle into the boiler of a locomotive engine prevails among different machinists or manufacturers of engines; and, if yea, state fully the different methods.

106 X Intg. 4th. Have you ever known an instance of a locomotive running on a railroad track at the rate of 15 miles per hour being thrown off the track and down an embankment 10 feet high, and having its steam-whistle thrown violently against a stump or other hard substance; if yea, what result follows? If you say you know of an occurrence or of occurrences, such as you are above asked concerning, please state fully how many occurrences of the kind you have ever known, and state fully what result followed in each case.

107 X Int'r'g. 5th. Are there more ways than one to properly construct a locomotive engine? If you say there are, then describe the dif'erent methods of constructing them.

X Int'r'g. 6th. If you say you ever examined the locomotive engine which W. C. Hough was running at the time he received the injury which resulted in his death, please say when you examined it, and where and in what condition it was when you made the examination.

X Int'r'g. 7th. Did you ever examine the pilot or cow-catcher attached to locomotive engine No. 4 of the Texas and Pacific Railway when said engine was running or in motion on the track? If yea, state as accu-

rately as you can how high said pilot was from the track when said engine was in motion.

STEDMAN & SEXTON,
Att'ys for Pl'ffs.

THE STATE OF TEXAS,
Harrison County:

I, William C. Pierce, clerk of the district court of Harrison
108 County, do hereby certify that the above and foregoing is a true and correct copy of the original direct and cross interrogatories, as filed in my office, in the case of Annie Hough vs. T. & P. R'w'y Co.

To certify which I hereunto sign my name and affix the seal of my office, at the city of Marshall, this January 6th, 1875.

[S. S.] W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

Answers of J. A. Hough to direct int'r'g'ys.

ANNIE HOUGH ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

By virtue of a commission issued to me by the district clerk of the county of Harrison, to take the depositions of James A. Hough in the above entitled cause, I have this day caused to come before me, at my office in the city of Marshall, the aforesaid witness, who, after being duly sworn by me according to law, makes answers as follows to the interrogatories propounded to him:

109 Answers of J. A. Hough to direct int'g's.

To 1st int'r'g. he says: I know the plaintiffs. Annie Hough is the widow of W. C. Hough, and James A. Hough is the son of the said W. C. Hough and Annie Hough. Annie Hough is the widow of my son, W. C. Hough, and James A. Hough is my grandson.

To 2nd int'r'y he says: I did; he was my son; his age was thirty-two years and six months liking a day; when he died his occupation was an engineer or machinist. He was a first-class machinist and a first-class engineer, being used in all the branches pertaining to his trade, including drafting; he commanded the highest wages wherever he worked as journeyman; he was amply qualified to take charge of any locomotive machine shop, and could command one hundred and fifty dollars as foreman.

To 3d int'r'g. he says: They are his widow and son. The child will be two years old the 18th of this present month; they have
110 but very little property, and what they have is unproductive; they are almost wholly dependant on their relatives for a support, through his exertions and his wages as an engineer and machinist.

To 4th int'r'g. he says: I am fifty-seven years old. I am a machinist by trade. I have followed it some twenty-eight years. I have had some six years' experience in the manufacture exclusively in the construction and repairing. I have had some twenty years' experience either as foreman or journeyman or master mechanic. I have been master mechanic on Miss. and Tenn. roads, and on the Union Pacific. I was division master mechanic on the Grand Trunk. I have had at some places as high as one hundred and fifty locomotives under my control. I have had

some ten years' experience in the operation and repairs of locomotives, to say the least of it, when I have had general charge.

111 To 5th int'r'g. he says: I saw him at Scott's, some thirteen miles below here, some twelve or fourteen hours before he died. He was badly burned, but was able to converse freely. His being burned was the cause of his death; probably the immediate cause was inhaling steam. He was employed by the Texas & Pacific Railroad as engineer.

To 6th int'r'g. he says: I was not present when he was hurt. It was some two hours after the injury before I saw him.

To 7th int'r'g. he says: He was burned by his engine being thrown from the track on 8th March, 1874. My son was the engineer driving said engine.

To 8th int'r'g. he says: The engine was the number four.

To 9th int'r'g. he says: I did. I found the engine in a ditch laying on its side with the steam-whistle detached. I did find clothing of

112 my son. I found a pair of pants, coat, and vest. They were evidently in the box where he kept them, but the box partially demolished.

To 10th int'r'g. he says: He was injured by the escaping of steam from the engine; the steam escaped from the hole where the steam-whistle was formerly inserted in the dome-cap.

To 11th int'r'g. he says: I found the hole in the dome cap with some of the upper portions of the thread torn out. The steam-whistle being detached from the dome-cap, it left a hole two and one-half inches for steam to escape, or nearly so.

To 12th int'r'g. he says: They are screwed into the dome-cap. I am familiar with the construction of that part of the engine, and have had experience. The examination in this particular engine developed the fact that the whistle had so much taper to the part that screwed

113 into the dome-cap that only a few threads held at the top of the hole where the whistle was inserted.

To 13th int'r'g. he says: There was. It was improperly fitted in the hole and the part screwed into the dome-cap was too short, not being over a half in depth when it should have been two and one-half inches, and the part screwing into the dome-cap tapered so much that it did not fit the hole down through, only a few threads holding at the top of the hole. The properly fastened whistle would have been turned so as to have fitted the hole so that all of the threads would have held full length of the hole in the dome-cap.

To 14th int'r'g. he says: The dome-cap is cast iron of great strength, screwed on to the dome, with three holes in it. Two for the safety valves and one for the steam-whistle, which is little in front of *certen* of cap.

The depth of the casting where the steam-whistle screws in is

114 from two to two and one-half inches thick. The whistle is a brass casting screwed into the dome-cap with a valve in the bottom or next to the steam, which the steam inside of boiler holds in position. That valve is forced down by a lever and the steam communicates with whistle above. It is not weaker.

To 15th int'r'g. he says: I never knew of a steam-whistle being blown out or knocked out of a properly constructed engine.

To 16th int'r'g. he says: It is far greater.

To 17 int'r'g. he says: It is difficult to blow out; if there was sufficient steam to explode the boiler, or engine should be thrown from the track and strike a stump and breake the whistle off, or even wrench the dome-cap from its place, the part of the whistle that screws into the dome-

cap would still be intact. I base it upon the known strength of
115 the portion of the engine, and from the examinations of boilers that have exploded, and the examinations of engines wrecked by collisions and otherwise.

To 18th int'r'g. he says: It came out because it was improperly fitted in the hole of the dome, evidently striking some hard substance.

To 19th int'r'g. he says: There was, but never made a particular examination.

To 20th int'r'g. he says: I never made a particular examination, but do know that it was not a good pilot; it was bad shaped.

To 21st inter'y he says: Yes; it was a bull or steer or cow that was the cause. I saw detached portions of it on the track.

To 22d int'r'g. he says: I was; he said to me that he was run-
116 ning about twelve miles per hour, and that the first he saw was some animal jumped on the track from the fireman's side, ten or twelve feet in front of the engine. He found that the engine was leaving the track, and that he reversed his engine and put on his air-brakes and stopped the train, and his engine rolled over down the embankment; he said that he could have got off and saved himself, but being on a fill, and trestle-work just ahead, he could not reconsile that to his duty to his passengers, and took the chances to stop the train, and remained at his post; this conversation occurred ten hours before his death.

J. A. HOUGH.

Sworn to & subscribed before me Jan'ry 7th, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

Cross-interrogatories propounded to James A. Hough by the defendant.

Answers to X int'r'g's by J. A. Hough.

117 To 1st X int'r'g. he says: I worked on the Grand Trunk, Canada, on the Miss. & Tenn., on the Illiosnois Central, on the Union Pacific. C. J. Doran I worked with on the Grand Trunk; on the Miss. & Tenn. I worked with Col. R. Hough, residence No. 6, Brunswick Park, Boston, Mass, the gen'l sup't of said road; on the Ill's Central, Samuel Haynes, gen'l sup't of machinery; on the Union Pacific with Sam'l B. Reed, gen'l sup't at that time, residence Torlett, Ill.

To 2d X int'r'g. he says: I know it because he told me that he was scal'ed by steam from the engine; a fireman likewise told me, Mr. J. Walker, the appearances and everything went to show that it was the fact; it was a conceded fact by all present that I conversed with. I was not.

To 3d X int'ry he says: There is; one is, which is adopted by most locomotive builders, in screwing the whistle into the dome-cap; the other method is by having a flange on the base of the whistle & bolted firmly to the dome-cap.

118 To 4th X int'ry he says: No.

To 5th X inte'ry he says: There is different ways of constructing engines, but not material.

To 6th X int'ry he says: I examined it in the ditch where it was thrown at the time of the accident. I found that the whistle was detached from the dome cap where it was inserted, the threads in the upper part of the hole where the whistle was inserted in the dome cap was torn out.

To 7th X int'r'g. he says: I made no particular examination; I can t say.

J. A. HOUGH.

Sworn to and subscribed before me Jan'ry 7, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

THE STATE OF TEXAS,
Harrison County:

I, William C. Pierce, clerk of the district court of Harrison
119 County, do hereby certify that the foregoing answers of James A. Hough, the witness before named, to direct and cross interrogatories were made before me and were sworn to and subscribed before me by the said witness, in case No. 6227, Harrison County, Texas, of Annie Hough vs. The Texas and Pacific Railway Company.

To certify which, I hereto sign my name and affix the seal of my office, at the city of Marshall, this January 7, A. D. 1875.

[SEAL.]

W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

Filed 12th January, 1875.

W. C. PIERCE, *Clerk*.

STATE OF TEXAS,
County of Harrison:

To any public officer of the county of Cook, in the State of Illinois, having under the laws of said State authority to take depositions:

Know ye that, reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by
120 any and all means, at such time as you may appoint, G. W. Cushing, and that you then and there carefully examine him, upon oath first taken before you, touching the annexed interrogatories, observing the following requirement of the law of this State:

1st. That you reduce or cause to be reduced his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2nd. That you certify, under your hand and seal of office, that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit, and the name of the witness, directing it "To the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail, you will get the
121 postmaster to endorse on them that he received them from you, signing his name to such endorsement, officially; if sent by private conveyance, the person conveying them must in person deliver them in the office of our said court, and there make oath that they have not been out of his possession, and undergone no alteration; which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough et al. are plaintiffs, and T. & P. R'w'y Company defendant.

Herein fail not, and return make.

Test, W. C. Pierce, clerk of the district court of Harrison County, and seal of said court, at Marshall, this 16 day of April, 1875.

[SEAL.]

W. C. PIERCE,
Clerk District Court, Harrison County,
By A. POPE,
Deputy.

(Endorsed:) Commission issued 16 April, 1875.
W. C. PIERCE, *Clerk,*
By A. POPE, *Deputy.*

ANNIE HOUGH ET AL.
vs.
TEXAS & PACIFIC RAILWAY COMPANY.

122 Suit pending in the district court of Harrison County, Texas.

Interrogatories to be propounded to George W. Cushing, who resides in the county of Cook, in the State of Illino's, the answers to which will be read in evidence upon the trial of the above-entitled cause in behalf of the defendant; direct int'r'g's to G. W. Cushing.

Int'ry 1st. Do you know the parties to this suit?

Int'ry 2d. What is your vocation or occupation, and how long have you been employed or engaged as such? If you say that you are an engineer or machinist, state what your experience as such has been, and state what your duties as such were; are you engaged in the employment of any company at this time? If yea, state what company. Have you ever been engaged in the service of any railroad company or companies, in what capacity or capacities were you so engaged,
123 and how long were you so engaged?

Int'ry 3d. If you say that you are a machinist and engineer, then state if you know anything of locomotive engines manufactured by the Pittsburg Locomotive Car Works since the year 1871. If yea, state whether or not you have had any connection with the locomotive engines manufactured by said company since 1871. If yea, state what your connection with them has been, how many of said locomotives have you been connected with, on what roads were said locomotives, and in what capacity were you connected with them?

Int'r'g 4th. If you say that you have been connected with locomotive engines manufactured by the Pittsburg Locomotive and Car Works, then state whether or not you are acquainted with the locomotive
124 engines manufactured by other companies or at other establishments. If yea, state the manufactories of what other companies or establishments you are acquainted with; state also the comparative merits of the locomotive engines manufactured by the Pittsburg Locomotive and Car Works and other manufactories of which you speak; describe the dif'erence, if any, between the construction of the locomotives made by the Pittsburg Locomotive and Car Works of which you may speak. Do you know anything of the mode of the construction of the whistles of locomotive engines made by the Pittsburg Locomotive and Car Works? If yea, state whether or not they are in accordance with the approved mode of constructing whistles for locomotive engines. If not, state in what respect said mode differs from the approved mode.

Int'r'g 5th. If you state that the mode of constructing and fastening whistles to locomotive engines adopted by the Pittsburg Locomo-
125 tive and Car Works is different from that used by other manufactories, then state which you regard as the best mode and the reasons for your opinion.

Int'r'g 6th. Sup'ose a locomotive engine were to be thrown from a track down an embankment ten or fifteen feet high, and the whistle were to strike a stump a foot or more in diameter; state what in your opinion would be the result to the whistle of such a collision, however the same may have been fastened to the locomotive.

F. B. SEXTON,
W. STEDMAN,
Att'ys for Def't.

Cross-interrogatories to G. W. Cushing:

Cross-interrogatories.

X Int'ry 1st. State in whose employ you are at this time, and are you interested in any railroad company at this time? And if you say that you are in the employment of any railroad company at this time,
126 then state what is the nature and character of your duties.

X Int'ry 2nd. If you say that you are employed by the Pittsburg Locomotive and Car Works, then state if said company ever built or put up a defective locomotive to you' knowledge; and, if it did, you own it, if you know it.

X Int'ry 3d. Have you talked with any agent or person of the defendant in this suit, about what you would swear in this case; and, if so, who, and how did the def't find out what you would swear to in this case?

X Int'ry 4th. In the sixth interrogatory the defendant has asked you what would be the effect of an engine rol'ing down a bank fifteen feet striking a stump, &c., &c., on the whistle; now we ask you if you ever knew a steam-whistle properly put in the first place to be knocked
127 entirely out by such a fall as is described in the def't's 6th question to you; if yea, how many times?

X Int'ry 5th. About how far is the steam-whistle let into the engine or dome-cap of a locomotive? Is it screwed in, or how is it fastened? And if you say the steam-whistle is screwed in, then state how many inches it is screwed in, and about how many threads on the screws to the inch on the part that is fastened into the dome-cap or engine.

X Int'y 6th. If in answer to the above question, you say that the steam-whistle is screwed into the dome-cap of the engine, then suppose *out* three of the threads on the whistle caught, touched, or held in the grooves of the dome-cap, would that whistle be considered safely and securely fastened?

128 X Int'y 7. How many steam-whistles that had been properly put in at first, have you known to blow out? Is it a common or an uncommon occurrence for the steam-whistle of a locomotive engine to blow out?

GEORGE L. HILL, &
TURNER & LIPSCOMB,
Att'ys for Pl'ffs.

THE STATE OF TEXAS,
Harrison County:

I, W. C. Pierce, clerk of the district court of Harrison County, do hereby certify that the above and foregoing is a true & correct copy of the original, direct & cross interrogatories to George W. Cushing, as now on file in my office.

To certify which I hereto sign my name and affix the seal of my office, at the city of Marshall, this 16th day of April, A. D. 1875.

[SEAL.] W. C. PIERCE, *Clerk*,
By A. POPE, *Deputy*.

The depositions of G. W. Cushing, of the city of Chicago, county of Cook, and State of Illinois, a witness of lawful age, produced, sworn and examined upon his oath, on the 26 day of April, 1875, at
129 my office, at rooms 30 & 31, Ashland block, in said city of Chicago, by me, W. H. Richardson, a notary public in and for said city of Chicago, and duly commissioned, by virtue of the annexed commission, to cause to come before me said George W. Cushing for examination as a witness in a certain suit now pending and undetermined in the district court of Harrison County, Texas, wherein Annie Hough et al. are plaintiffs, and Texas & Pacific Railway Company is defendant, as well upon the interrogatories for said defendant as upon the cross-interrogatories of said plaintiffs, which are attached to said commission.

The said George W. Cushing being first duly sworn by me as a witness in the said cause, before the commencement of his examination, to certify the truth as well on the part of pl'ffs as the defendant in relation to the matters in controversy between said partees, so far as he should be interrogated, testified as follows:

130 Answers to direct-int'r'g's.

Ans. to 1st int'r'g. I do not.

Ans. to 2nd int'r'g. I am a master mechanic of railroads, and have been for about fifteen years: my duties have been the construction and repairs of railroad locomotives. I am not at present engaged in the employment of any company. During the past fifteen years, I have worked in the above capacity as follows: For the Chicago Northwestern Railroad Company about nine or ten years, for the Northern Pacific Railroad Co. about two or three years, for the Tolodo, Wabash and Western Railroad Company about one or two years, and for the Kansas Pacific Railroad Company about one or two years.

Ans. to 3d int'r'g. I do know of the locomotive engines manufactured by the Pittsburg Locomotive and Car Works since the year 1871, and I have had connection with the locomotives engines manufact-
131 ured by said company since 1871; said connection was as follows: as master mechanic for said Toledo, Wabash and Western R. R. Co., I had the general charge and supervision of about ten or twelve of said locomotive engines.

Ans. to 4th int'r'g. I am acquainted with locomotive engines generally built in this country by various companies, and in fact with nearly all builders, unless it may be with one or two recently started. The said locomotive engines, built by said Pittsburg Locomotive and Car Works, are standard locomotive engines, and there is little difference in the construction or merits of standard engines built in this country. The difference between their engines and those constructed by other companies is very slight, and consists principally in the proportions of the engines. The whistles of the locomotive engines made by the Pittsburg Locomo-
132 tive Car Works are similar to those of other companies' construction, and the difference, if any, is very slight.

Ans. to 5th int'r'g. As I have before stated, the difference is slight and immeterial.

Ans. to 5 int'r'g. The result would be distruction of the whistle.

Answers to cross-int'r'g's.

Ans. to 1st X int'r'g. I am not at present in the employment of any railroad company.

Ans. to 2nd X int'r'g. I am not and never was in the employ of said Pittsburg Locomotive and Car Works Company.

Ans. to 3d X int'r'g. Have not seen or talked with any one connected with this road.

Ans. to 4 X int'r'g. It is a thing which very frequently occurs when an engine goes down an embankment for the whistle to be
133 knocked off & distroyed; it is a thing engineers most dread and frequently talk of.

Ans. to 5th X int'r'g. The steam-whistles are usually screwed into the dome-cap, and the depth depends upon the thickness of the dome-cap, which varies from three quarters of an inch to an inch, and there are usually from eight to twelve threads to the inch. There is not any standard number, and the number usually depends upon the size of the whistle-stem.

Ans. to 6th X int'r'g. It might be impossible in some instances to get more than three threads, but with only that number I should hardly regard the whistle as securely fastened.

Ans. to 7th X int'r'g. I don't know as I understand what you mean by "blowing out." If you mean to become disabled in case of an accident, I should answer that it was a very common thing, but if you
134 mean to blow the whistle out of the dome-cap by the simple pressure of the steam, I should say I never heard of such a case.

GEORGE W. CUSHING.

I, W. H. Richardson aforesaid, the notary public duly commissioned by the annexed commission to take the depositions of George W. Cushing, the witness whose name is *is* subscribed to the foregoing depositions, do certify, that before the commencement of his examination as a witness in the said suit between said Annie Hough et al., plaintiffs, and Texas & Pacific Railway Company, defendant, he, said George W. Cushing, was duly sworn by me to testify the truth in relation to the matters in controversy between said parties, so far as he should be interrogated concirning the same, & that after the said depositions were written by me as aforesaid, the interrogatories & cross-interrogatories and the answers thereto, as by me written down in said depositions in the presence of said Cushing, were by me read over to said George W. Cushing, and that thereupon said depositions & answers were
135 signed & sworn to by said George W. Cushing before me, at my said office, on said 26th day of April, A. D. 1875.

Witness my hand & notarial seal, this 26 day of April, A. D. 1875.

[SEAL.] W. H. RICHARDSON,
Notary Public in & for said City of Chicago.

Filed 30th April, 1875.

W. C. PIERCE, *Clerk.*

THE STATE OF TEXAS,
Harrison County:

To any lawful officer of the county of St. Clair, in the State of Illinois, having authority under the laws of said State to take depositions:

Know ye, that reposing special confidence in your integrity, you are hereby commissioned to call and cause to come before you, by any and

all means, at such time as you may appoint, A. Gustine, and that you then and there carefully examine him upon oath, first taken be-
136 fore you, touching the annexed interrogatories, observing the following requirements of the law of this State:

1st. That you reduce, or cause to be reduced, his answers so taken to writing, in proper form, the same to be subscribed and sworn to in your presence by said witness.

2nd. That you certify, under your hand and seal of office, that said answers were subscribed and sworn to before you.

3rd. That you seal up in an envelope the answers so taken, together with the annexed interrogatories and this commission, endorsing your name across the seal of the envelope.

4th. That you endorse on the envelope the names of the parties to the suit and the name of the witness directing it, "To the clerk of the district court of Harrison County, Texas."

5th. That if said package is sent by mail, you will get the postmaster to endorse on them that he received them from you, signing his name to such endorsement officially. If sent by private conveyance, the person conveying them must in person deliver them in the office
137 of our said court, and there make oath that they have not been out of his possession and undergone no alteration; which answers, when so taken, will be used as evidence on the trial of a certain cause now pending in our said district court of Harrison County, wherein Annie Hough et al. are plaintiffs, and the Texas and Pacific Railway Company, defendant.

Herein fail not, and return make.

Teste: W. C. Pierce, clerk of the district court of said county, and seal of the same, at Marshall, this 2nd day of April, 1875.

W. C. PIERCE,
Clk D. C. H. C.,
By A. POPE, *Dep'ty.*

(Endorsed:)
Commission issued 2d April, 1875.

W. C. PIERCE, *Clerk*,
By A. POPE, *Dep'ty.*

ANNIE HOUGH ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY.

Suit pending in the district court of Harrison County, May term, A. D. 1875.

Interrogatories propounded to A. Gustine, a resident of citizen of St. Clair County, in the State of Illinois, the answers to which will be read in evidence by defendant on the trial of said cause:

138 Direct int'r'g's to A. Gustine.

Int'r'g. 1st. Do you know the parties to this suit, or either of them?

Int'r'g. 2nd. Where do you reside; what is your occupation, and what has been your occupation since you engaged in business for yourself; have you been engaged in the service or in the employment of any railroad company or companies; if so, how long, and for what company or companies and in what capacity or capacities? Are you a practical machinist? What is your present occupation? If you are now in the

employment of any railroad company, please say what one, and in what capacity you are employed, & how long you have been so employed.

Int'r'g. 3rd. What was your employment, or in what were you engaged in the months of February and March, 1873? If you say you were
139 engaged in the service of any railroad company at the time indicated, please say what company and where were you so engaged, and in what capacity. Do you know anything about locomotive steam-engine No. 4, belonging to the Texas and Pacific Railway Company? If so, please say what you know about said engine and how you know it.

Int'r'g. 4th. If in answer to interrogatory 3rd you say you know anything about, locomotive engine No. 4, belonging to the Texas & Pacific Railway Company, please say when and where you first saw said engine and in what condition it was when you first saw it. Do you know whither or not anything was done to said engine in the shops where you were at work at the time when you first saw it? If so, please say what was done to said engine and who did it.

Int'r'g. 5th. If in answer to interrogatory 4th you say that locomotive engine No. 4 belonging to the Texas & Pacific Railway Company
140 was "set up" in the shops where you were at work in February and March, 1873, please say what you mean by being "set up."

Int'r'g. 6th. Do you know anything of the fastening of the whistle of said locomotive engine No. 4 to the dome-cap of said engine? If yea, state when, where, and by whom it was so fastened, and state the manner in which it was so fastened; state also whether the fastening of said whistles was according to the usual and approved mode of fastening whistles to locomotive engines; if not, state in what the difference consisted.

Int'r'g. 7th. If you say you know said locomotive engine No. 4, state whether or not said engine was ever run on any road with which you were connected; if yea, state what road it was so run upon? How long was it run on said road? If you say that said engine was run on the
141 Indianapolis and St. Louis Railroad, then state, if you know, when said engine was sent to Texas; if yea, state when it was so sent, by what route was it sent, and what was its condition when it was so sent; and why was said engine run on said Indianapolis & St. Louis Railroad?

Int'r'g. 8th. Do you know when said locomotive engine No. 4 was manufactured? If yea, state at what place and by what company and at what works. If you say that said engine No. 4 was run of the Indianapolis & St. Louis Railroad, then state the reason why it was so run & why it was not at once forwarded to Texas.

F. B. SEXTON,
WM. STEDMAN,
Def'ts' Att'ys.

Cross-int'r'g's to A. Gustine.

Cross-interrogatories propounded to the aforesaid witness, A. Gustine, by the plaintiff, the answers to which will be read in evidence on the trial of said cause.

142 To the 1st X int'r'g. If in answer to direct interrogatory 3rd you say that you know something about a steam locomotive engine called the No. 4, then state if you know how the steam-whistle of said engine was fastened into or on said engine; was it screwed into said engine, and, if yea, about how many threads caught, and about how many threads were there on said steam-whistle to the inch; and if a

steam-whistle was screwed into the dome-cap of an engine, would the whistle be safe or secure if only one-half of the threads caught or touched?

X Int'r'g. 2d. Do you know how the steam-whistle of engine No. 4 was fastened into the dome-cap of that engine? If yea, state how far the whistle was let into the dome-cap. If it was screwed in, state how far it was screwed in. Did all the threads on the steam-whistle catch or hold?

143 X Inter'y 3d. If you say the engine No. 4 was "set up" in the shops where you were employed, then state whether the steam-whistle of engine No. 4 was examined by you, and how it was fastened. State fully all you know about it.

X Int'r'g. 4th. How did the defendant in this suit find out that you knew anything about engine No. 4 of the Texas and Pacific Railway Company; and don't you really believe that the steam-whistle of engine No. 4 was actually fastened into that engine better than any steam whistle was ever fastened into an engine before? Say.

X Int'r'g. 5th. Do you know anything about how far a pilot should be from the track when the engine to which the pilot is fastened is in motion? If you do, then tell us how high the pilot of an engine should be above the track when the engine is in motion. State the height in inches, feet, or yards.

GEO. L. HILL &
TURNER & LIPSCOMB,
Att'ys for Pl'ffs.

144 THE STATE OF TEXAS,
Harrison County:

I, William C. Pierce, clerk of the district court of Harrison County, *of Harrison County*, do hereby certify that the above and foregoing is a true & correct copy of the original direct & cross interrogatories as now on file in my office.

To certify which I hereto sign my name and affix the seal of my office, at the city of Marshall, this the 2nd day of April, A. D. 1875.

[SEAL.] W. C. PIERCE,
Clerk D. C. H. C.,
By A. POPE,
Deputy Clk.

Issued 2nd April, 1875.

W. C. PIERCE, *Clerk,*
By A. POPE, *Deputy.*

Depositions of Anson Gustire, witness, produced, & sworn to before me, William C. Hewitt, a notary public of East St. Louis, Ill's, at East St. Louis, in St. Clair County, State of Illinois, on the 11 day of June, A. D. 1875, pursuant to the enclosed commission taken on part of defendant in a certain action now pending in the district
145 court of Harrison County, in the State of Texas, wherein Annie Hough et al. are plaintiffs and the Texas and Pacific Railway Company is defendant.

The said Anson Gustine being duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes as follows:

Int'r'g. 1st. Do you know the parties to this suit, or either of them?
Answer. I do not.
Int'r'g. 2nd. Where do you reside? What is your occupation, and what

has been your occupation since you engaged in business for yourself? Have you been engaged in the service or employment of any railroad company or companies? If so, how long and for what company or companies and in what capacity or capacities? Are you a practical machinist? What is your present occupation? Are you now in the employment of any railroad company; in what capacity, and how long have you been so employed?

146 Answer. I reside in East St. Louis, St. Clair County, Illinois; am foreman of Indianapolis and St. Louis railroad shops at East St. Louis. Since I engaged for myself, I have been machinist, locomotive engineer and foreman of railroad shops: have been engaged on the New York and Erie R'r'd about 2 years as machinest; Terre Haute and Alton R'road about 2 years as machinest & foreman of shops; on the St. Louis and Alton & Terre Haute Railroad about 10 years as locomotive engineer, and on the Indianapolis & St. Louis Railroad for the past 5 years as foreman of their East St. Louis, Ill., shops. I consider myself a practical machinest. Foreman of I. & S. L. R'rd shops at East St. Louis is my present occupation, and am employed by that railroad company.

Int'r'g. 3d. What was your employment or in what were you engaged in the months of February and March, 1873? Do you know any-

147 thing about locomotive steam-engine No. 4, belonging to the Texas & Pacific Railway Company, & how do you know it?

Answer. Was foreman of Indianapolis & St. Louis Railroad Company shops at East St. Louis, Ills., in the months of February & March, 1873. I know locomotive steam-engine No. 4, belonging to the Texas & Pacific *& Pacific* Railway Company; it was "set up" in the I. & St. Louis shops to be used on the I. & St. L. Railroad.

Int'r'g. 4th. When and where did you first see said engine, and in what condition was it when you first saw it? Was anything done to said engine in the shops where you were at work at the time when you first saw it, and what was done to it, and who done it?

Answer. I think it was in December, 1872, that I first saw said engine. It was standing on a side track near the I. & St. L. R. R. Co. shops, where it stood for about 2½ months, when it was taken into the shops & "set up." Was in a good condition as engines generally are dur-

148 ing transportation. It was brought into the I. & St. Louis R. R. shops & "set up" and made ready for service under my supervision.

Int'r'g. 5th. What do you mean by the word "set up"?

Answer. It is a term among railroad men that applies to putting in running order new locomotives.

Int'r'g. 6th. Do you know anything of the fastening of the whistle of said locomotive No. 4 to the dome-cap of said engine, and when, where, and by whom was it so fastened, and in what manner was it so fastened, and was it in accordance with the usual and approved mode of fastening whistles to locomotive engines?

Answer. I did not fasten the said whistle to the dome-cap of said engine myself, but know it was done. It was done by some machinest under my charge, but who, I do not recollect.

Int'r'g. 7th. Was said locomotive engine No. 4 ever run on any

149 railroad with which you were connected? What road was it so run upon, and how long was it so run? When was it sent to Texas, by what route was it sent, and in what condition was it so sent, & why was it run of said I. & St. L. R. R.?

Answer. It was run on the Indianapolis and St. Louis Railroad while

I was foreman of their East St. Louis, Ill., shops, between Mattoon, Ills., and Indianapolis, Indiana, for about four or five weeks. It was sent to Texas, I think, in the latter part of March or the first of April, 1873. Do not know by what route it was sent to Texas; machinery was taken down & boxed and put in good shipping order. Do not know why it was run of the I. & St. Louis Road only from hearsay, & that was that the company was short of power and leased it.

Int'r'g. 8th. Where was said engine manufactured, at what place, by what company, and what works, and why was it run on the I. & St. L. Road & forwarded at once to Texas?

150 Answer. Do *you* know when it was manufactured, but knows it was manufactured at Pittsburgh Locomotive Works. I don't know why it was not sent at once to Texas.

Cross-interrogatories propounded to the aforesaid witness, Ansen Gustine, by the plaintiff, the answers to which will be read in evidence on the trial of said cause.

X Int'r'g. 1st. Do you know that the steam-whistle of said engine No. 4 was fastened into or on said engine, and about how ma'y threads caught, and about how many threads were there on said steam-whistle to the inch? If a steam-whistle was screwed into the dome cap of an engine would the whistle be safe or secure if only one-half the threads caught or touched it?

Answer. It was during the time of service on the I. & St. L. R'road. Don't know whether it was screwed into or bolted on the dome cap. Could not tell whether it would be safe or not without examining.

151 X Int'r'g. 2nd. Do you know how the steam-whistle of engine No. 4 was fastened into the dome cap of that engine, & how far it was set into the dome cap?

Answer. Don't know whether it was screwed or bolted.

X Int'r'g. 3d. When the engine No. 4 was "set up" in the I. & St. L. R'rd shops, did you examine the steam-whistle of said engine, and how it was fastened?

Answer. Did not examine the steam-whistle of said engine, nor how it was fastened.

X Int'r'g. 4th. How did defendant in this suit find out that you knew anything about engine No. 4 of the Texas & Pacific Railway Company, and don't you really believe that the steam-whistle of engine No. 4 was actually fastened into that engine better than any steam-whistle was ever fastened into an engine before?

Answer. Upon enquiry of Supt. Sampson of the Vandalia line,

152 who ref/er'ed the letter to Mr. Woodward, supt. of the I. & St. L. R'road, who enquired of me. Could & would not say that the whistle was fastened into the engine No. 4 better than any steam-whistle before.

Int'r'g. X 5th. Do you know about how far a pilot should be from the track when the engine is in motion?

Answer. From three to five inches.

ANSON GUSTINE.

THE STATE OF ILLINOIS,
County of St. Clair, City of East St. Louis:

I, William C. Hewit, a notary public within and for said county, hereby certify that the above Anson Gustine was by me duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth relating to said cause; that his depositions was reduced to

writing by Henry D. Sexton, a disinterested person, in my presence.

153 Be it remembered that at a regular and stated term of the circuit court of the United States for the western district of Texas, begun and held at Tyler, in said district, the following proceedings among others were had on, to wit, the 4th day of December, A. D. 1875.

ANNIE HOUGH
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } 1526.

Ordered, that plaintiffs have leave to amend as of date Dec. 3, 1875.

154 In the circuit court of the United States for the western district of Texas, at Tyler.

ANNIE HOUGH
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } 1526.

And now come William Stedman and F. B. Sexton, attorneys for the defendant in the above entitled cause, who, after being duly sworn, say upon their oaths that the defendant cannot go safely to trial at the present term of the court for want of testimony material to the defendant's defense, to wit, the testimony of John A. Hauglin, J. H. Thompson, and S. G. Knowlton, all of whom are material witnesses for the defendant, all of whom reside in Harrison County in the State of Texas, and within one hundred miles of Tyler. Affiants state that the defendant has used due diligence to procure said testimony by causing a subpœna to issue from this court on the 20th Oct., 1875, for said Haughlin, which according to the subpœna docket of this court, appears to have been served on said Hanglin on the first day of November, 1875, by the marshal of
155 this court, and by causing subpœnas to be issued for said Thompson & Knowlton on the first day of November, 1875, which according to the return of the marshal of this court have not been served. Affiants further state that this application is not made for delay, but to obtain justice.

WILLIAM STEDMAN.
F. B. SEXTON.

Subscribed & sworn to before me, this 6th day of Dec'r, 1875.
W. C. ROBARDS, *Clerk.*

Be it remembered that at a regular and stated term of the circuit court of the United States for the western district of Texas, begun and held at Tyler, in said district, the following proceedings among others were had on, to wit, the 4th day of December A. D. 1875.

ANNIE HOUGH ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY CO. } 1526.

Ordered that this cause be continued on affidavit of defendant.

155½ U. S. circuit court for western district of Texas, April term, 1875

A. E. HOUGH ET AL.
v.
T. & P. R'Y CO.

And now comes the plaintiffs and by leave of the court amend their

petition, and say that the defendant is an incorporated company created by law, and having its domicil and principal office at the city of Marshall and State of Texas, and as such exercising its corporate powers, privileges and franchises, under and by virtue of an act of the legislature of the State of Texas, and the general laws of said State made and provided, and that said Wentworth Hough was an engineer in the service of said company at the time of his death, and that the death of said Wentworth was caused by the gross carelessness and negligence of said defendant to supply suitable and safe machinery, and a suitable and safe railroad, over which to run its engines; by reason of such carelessness and neglect, the said Wentworth was killed in the manner and
156 form set out in the original petition, and by reason of which said plaintiffs have been robbed of a husband and father, and have been damaged as charged, and in the sum charged in the original petition; therefore plaintiff pray judgment as in the original petition, and for general relief.

ROBERTSONS & HERNDON,
G. L. HILL.
TURNER & LIPSCOMB,
For Plaintiffs.

ANNIE HOUGH,
vs.
TEXAS & PACIFIC RAILWAY CO.

Suit pending in the United States circuit court at Tyler.

And now comes James A. Hough & Athelia J. Hough, his wife, residents and citizens of Dodge County, State of Nebraska; and who are the parents of Wentworth C. Hough, the person alleged to have been killed by the negligence of def'd't, and by leave of the court make themselves parties plaintiff, and said J. A. & A. J. Hough now come by att'y, release and disclaim all damages or claim to damages in said suit
157 by reason of negligent killing of deceased by said defendant.

TURNER & LIPSCOMB,
HILL, ROBERTSONS & HERNDON,
Atty's for Plaintiffs.

158 ANNIE HOUGH & SON
vs.
THE TEXAS & PACIFIC R. W. CO.

This is a suit brought on the 9th June, 1875, both for compensatory and exemplary damages, by Annie , of the State of Iowa, in her own right, as the surviving wife of Wentworth C. Hough, and as the natural guardian of her infant son, James A. Hough, for the death of her husband, the said Wentworth C. Hough. She alleges that her said husband, being in the employment of the defendant, and in charge of engine No. 4, running between Shreveport and Marshall, was killed by said engine being thrown from the track on or about the 8th day of March, 1874, and that such death was the result of wilful and gross neglect of defendant in not furnishing a safe and reliable engine; that the engine in question was thrown from the track by a steer attemping to cross in front of it, and in consequence of the defective construction and arrangement of the pilot or "cow-catcher," which failed to throw said animal from the track.

She further alleges, that the steam-whistle attached to said en-
159 gine was not properly and securely fastened to the boiler, so that when the engine fell over the fastenings of the whistle blew out, and a jet of scalding steam and hot water was thrown upon her husband, thereby causing his death, &c.

The defendant denies all these allegations, and avers that engine No. 4 was entirely safe and reliable; that pilot or cow-catcher was properly constructed and attached to the same; that the engine was thrown from the track in consequence of a bull or steer running between the driving-wheel and forward trucks, under such circumstances as rendered it impossible for human sagacity or exertion to prevent the accident. Defendant further avers, that the whistle of said engine was securely fastened to the boiler in accordance with the usual approved mode, and that if it came out off said engine at all, it did not blow out but was knocked or torn out when the engine was thrown off the track. That if there was any defect about the engine the same was well known to the deceased and not known to the defendant, and that said deceased,
160 who had run other engines belonging to defendant, was at his own request assigned to the run between Marshall and Shreveport well knowing that said engine No. 4 belonged to and was used upon said run, &c.

These are the material issues made by the pleadings, and upon them and the facts in evidence I have to instruct the jury.

1st. That it is the duty of a railroad company or corporation to use all reasonable care in the proper construction of its road, and in supplying it with the necessary equipment, including properly constructed engines, and their several parts, and the necessary and proper materials for their repair. Also to select competent and skillful agents and subordinates to supervise, inspect, repair, and regulate the machinery and to regulate and control the operations of the road. The corporation or master, however, is not liable for injuries suffered by one employee solely through the carelessness or negligence of another employee of the same master, engaged in the same general service or business, and under the
161 same general control. Each employee engaged with others in the service of a common master takes upon himself the liabilities to injuries resulting from the negligence of his co-employees. The hazard is incident to the nature of employment in which he enters. There is no implied warranty of life or guarranty against injuries. The employee takes his place subject to all the dangers incident to the position. The master is only bound to provide competent and proper machinery & material, and to furnish skilful and careful employees to keep the same in repair and safe condition. If this be done, and one of the workmen or employees thus provided is simply guilty of negligence, resulting in an injury to another employee, it is not negligence of the master, and the corporation is not responsible. In such case, to render the master or corporation liable the injury must have resulted to one servant, not from the mere negligence of another, but from his incompetency or unskilfulness, and this must be shown satisfactorily; and if the injury arises from a defect or insufficiency in the machinery or any of its necessary parts, which have been furnished by the master to the servant,
162 a knowledge of this defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care; in other words, it must be shown that he either knew or ought to have known the defects which caused the injury in order to render him liable. A different rule however would apply as respects the liability of the master to a passen-

ger over the road. All agents and employees on a railroad, who are engaged in the same general employment and business of keeping up, running and operating the road, are fellow-servants; master mechanics, foremen of round-houses, and other persons engaged in the repair of machinery and rolling-stock for a railroad are fellow servants with the engineer, conductors, and other persons engaged in running trains. Under the general principals of law as there announced I charge the jury—

2nd. That if they believe from the testimony that the accident which resulted in the death of W. C. Hough, was produced by a bull running at or under the locomotive or tender of which said Hough
163 was the engineer, and throwing the same off the track, and that such accident occurred under such circumstances as that human skill and foresight could not prevent, or reasonably provide against it, then the defendant was not guilty of negligence, and you will find for the defendant.

3d. If you believe from the evidence that engine No. 4 was, when purchased and set up by the defendant, a standard and safe engine, and that the defendant exercised due and proper care in the employment of competent, prudent, and skilful agents to keep it in the same condition, and that the accident in question was not one resulting from the want of such competency, prudence, and skilfulness, then you will find for the defendant.

4th. If there was a defect in engine No. 4, or in the pilot thereto attached, and you believe from the evidence that the same was known to the deceased while he was running said engine, and before the happening of the accident described in plaintiffs' petition; or if you believe from the evidence that some days before the accident the pilot
164 attached to said engine was slightly damaged, or knocked out of square, and that the same was repaired by the agents or servants of the defendant, who were skilful, and competent to make such repairs, and that after such repairs were made, said pilot was considered safe, by those whose duty it was to make them, and determine on their safety, and that the deceased afterwards rece'ved and run said engine and pilot, then, in either event, you are instructed that the plaintiffs cannot recover, and you will find for the defendant. But—

5th. If the jury are satisfied from the evidence before them that the death of the deceased was owing, not to the negligence simply, but to the incompetency or want of skill on the part of any servant or agent of the defendant, who was working in the defendant's machine shop, then the defendant would be liable and the plaintiffs would be entitled to recover such actual pecuniary damages only, as the evidence may satisfy you the plaintiffs have sustained, and as you may think proportioned to the injury resulting from such death.

165 The testimony in this case is in some respects quite conflicting. It is the duty of the jury to reconcile all discrepancies if they can, but whether they can or not, it is their right to weigh the whole of the evidence, and give to each and every part of it such weight and credence as they may think proper, and in weighing the testimony and determining its credibility the jury can consider the manner and mode of testifying by the witnesses, their acquaintance with the subject about which they testify, the interest in the result of the suit if any, and any other circumstances they may think proper to take into account.

T. H. DUVAL,
U. S. Judge.

166 Be it remembered that at a regular and stated term of the circuit court of the United States for the western district of Texas, begun and held at Tyler, in said district, the following proceedings, among others, were had on, to wit, the 4th day of December, A. D. 1875.

THURSDAY, *May* 25, 1876.

ANNIE HOUGH ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY COMPANY. } 1526.

This cause coming on to be heard on demurrer of defendant, and the same having been fully argued by counsel and considered by the court, is overruled. And thereupon, both parties announced ready for trial, came a jury of good and lawful men of the western district of Texas, to wit, A. M. Murphey and eleven others, duly elected and empannelled and sworn, who, having heard the evidence, argument of counsel, and charge of the court, retired and returned into open court the following verdict, to wit:

We, the jury, find for the defendant.
(Signed) A. M. MURPHEY,
Foreman.

Whereupon it is the judgment of the court that the plaintiffs herein take nothing as to said defendant by this action, and that said
167 defendant go hence and recover of said plaintiffs all costs of suit in this behalf expended.

In the circuit court of the United States for the western district of Texas, at Tyler.

ANNIE HOUGH & SON
vs.
THE TEXAS & PACIFIC R. W. CO. }

Now comes the plaintiffs and moves the court to grant them a new trial—

1st. Because the verdict of the jury is contrary to the law and the evidence.

2nd. The court erred in its charge to the jury.

3d. The charge of the court mislead the jury.

4th. The court failed to charge the jury the law of the case as authorized by the facts.

5th. The result of the case would have been different had the court charged the jury the legal effect of W. C. Hough running the engine after knowing its defects, under protest and under promises by the master mechanic to put on a new pilot.

6th. The pl'tffs did not get the benefit of the law in the charge of the court that if W. C. Hough knew of the defect in the pilot and
168 protested against its being run in that condition and was indu'ed from day to day to run it by promises of the master mechanic and the master of the round-house that each day of running it in that condition should be the last, would have fixed the liability of the company.

7th. The court erroneously charged the jury that the master mechanic the foreman of the round-house were fellow-servants with the engineer.

8th. The court erroneously charged the jury that "all agents and employees on a railroad who are engaged in the same general employment and business of keeping up, running, and operating the road are fellow-servants."

9th. The jury were misled from said charge in believing therefrom that a master mechanic, whose business it is to employ mechanics, laborers in machine-shops, and engineers, is a fellow-servant with such employees.

10th. The jury were misled by the charge to believe that employees and agents, although engaged in different departments, are fellow-servants.

11th. The charge of the court misled the jury in this: the pl't'ffs
169 held the affirmative issues in the cause and were entitled to instructions applicable to affirmative propositions; but the instructions plead before the jury negative propositions for the pl't'ff and affirmative propositions for the def't, by reason of which the jury were misled.

TURNER & LIPSCOMB &
HILL & ROBERTSONS & HERNDON,
Att'ys for the Motion.

170 In the United States circuit court for the western district of Texas.

ANNIE HOUGH ET AL.
vs.
TEXAS & PACIFIC RAILWAY CO.

Be it remembered that at the April term of the circuit court of the United States for the western district of Texas, sitting at Tyler, before the honorable Thomas H. Duval, district judge, setting as circuit judge, in the above entitled cause the following proceedings were had, to wit:

The plaintiff offered evidence to show that the deceased W. C. Hough, who was husband of plaintiff, and father of her child, was scalded to death on his engine, being thrown from the track on the 8th of March, 1874. That his death was owing to two causes: 1st. Because the cow-catcher or pilot of the engine was defective, causing the engine to be thrown from the track, and 2nd. Because the whistle was defectively fastened to the boiler, and was blown or knocked out, whereby W. C. Hough was scalded to death by the hot water and steam issuing
171 from the opening so made. Also, that the defect in the cow-catcher or pilot was owing to the negligence of the master mechanic of the defendant's road, and the foreman of the round-house of defendant at Marshall; and that the defective whistle was owing to the negligence of the same officers; also that the master mechanic was the officer in the employment of defendant to whom was given the exclusive management of the motive power of defendant's road, that he had control of all engineers on the road, including W. C. Hough, the deceased, with power to employ, order, control, and discharge them at pleasure; and that all engineers on the road were bound to report to the master mechanic or foreman of the round-house for orders, and that no engine went out upon the road without the orders of one of the officers. Also that W. C. Hough, the deceased, knew of the defective condition of the cow-catcher or pilot, and had complained of that fact to both the master mechanic and the foreman of the round-house. That he had been promised that the defect should be remedied on the next trip a
172 number of times, that a new pilot has been made out, not put

on the engine owing to the negligence of these officers, and that the defect existed at the time of the accident. Also, other facts, showing the nature of his injuries, and the manner of his death, and extent of the damage to pl't'ffs.

Defendant offered evidence to show that the engine was not defective, and that due care had been exercised in its purchase in the first instance, and in the selection of the officers charged with keeping it in repairs; also that the defective cow-catcher or pilot was not the cause of the engine being thrown from the track, and that the whistle was securely fastened, and did not blow out, but that the cab was torn away, whereby the saf'y valve, was opened, thus scalding the deceased. Also, to show that if any of the defects charged to exist did exist, it was owing to the negligence of the master mechanic and foreman of the round-house, and that they were fellow-servants of W. C. Hough, the deceased. Upon proof being made of the above facts, the judge charged the jury as follows, to wit:

173 "The corporation, or master, however, is not liable for injuries suffered by one employed, solely through the carelessness or negligence of another employee of the same master engaged in the same general service or business, and under the same general control. Each employee engaged with others, in the service of a common master, takes upon himself the liability to injury resulting from the negligence of his coemployees. The hazard is incident to the nature of the employment in which he enters. There is no implied warranty of life or guarranty against injuries. The employee takes his place subject to the dangers incident to the position. The master is only bound to provide competent and proper machinery & materials, and to furnish skilful and careful employees, to keep the same in repair and safe condition. If this be done, and one of the workmen or employees thus provided is simply guilty of negligence, resulting in an injury to another employee, it is not the negligence of the master, and the corporation is not responsible.

174 In such case to render the master or corporation liable, the injury must have resulted to one servant, not from the mere negligence of another, but from his incompetency or unskillfulness; and this must be shown satisfactorily, and if the injury arises from a defect or insufficiency in the machinery or any of its necessary parts, which have been furnished by the master to the servant, a knowledge of this defect or insufficiency must be brought home to the master or proof given that he was ignorant of the same, through his own negligence and want of proper care. In other words, it must be shown that he either knew or ought to have known the defects which caused the injury in order to render him liable. A different rule, however, would apply as respects the liability of the master to a passenger over the road. All agents and employees on a railroad who are engaged in the same general employment and business of keeping up, running, and operating the road, are fellow servants. Master mechanics, foremen of round-houses & other

175 persons engaged in the repair of machinery and rolling-stock for a railroad, are fellow servants, with the engineers, conductors and other persons engaged in running trains."

To which charge of the court the plaintiff, by attorney, in open court excepted, as a mistake in law, and that this was error in giving said charge to the jury.

The judge also instructed the jury as follows:

"That if they believe from the evidence that the accident which resulted in the death of W. C. Hough was produced by a bull running at or under the locomotive or tender of which said Hough was the engi-

neer, and throwing the same off the track, and that such accident occurred under such circumstances as that human skill and foresight could not prevent, or reasonably provide against it, then the defendant was not guilty of negligence, and you will find for the defendant."

To which charge of the court the pl't'ff in open court excepted as a mistake in law, and the judge erred in giving the same to the jury.

The judge also charged the jury as follows:

176 "If you believe from the evidence that the engine No. 4 was when purchased and set up by the defendant a standard and safe engine, and that the defendant exercised due and proper care in the employment of competent, prudent, and skilful agents to keep it in the same condition, and that the accident in question was not one resulting from the want of such competency, prudence, and skilfulness, then you will find for the defendant."

To which charge of the court the plaintiffs in open court excepted as a mistake in law, and that the court erred in giving the same in charge to the jury.

The judge also charged the jury as follows:

"If there was a defect in engine No. 4, or in the pilot thereto attached, and you believe from the evidence that the same was known to the deceased while he was running said engine, and before the happening of the accident described in plaintiffs' petition, or if you believe from the evidence that some days before the accident the pilot attached to said engine was slightly damaged or knocked out of

177 square, and that the same was repaired by the agents or servants of the defendants, who were skilful and competent to make such repairs, and that after such repairs were made said pilot was considered safe by those whose duty it was to make them and determine on their safety, and the deceased afterwards received and run said engine and pilot, then in either event you are instructed that the plaintiff cannot recover, and you will find for the defendant."

To which charge of the court the pl't'ff, by attorney, in open court excepted as a mistake in law, and that the court erred in so charging the jury.

The judge also charged the jury as follows:

"If the jury are satisfied from the evidence before them that the death of deceased was owing, not to the negligence simply, but to the incompetency or want of skill on the part of any servant or agent of the defendant, who was working in the defendant's machine-shops, then the defendant would be liable and the plaintiff would be entitled to recover such actual pecuniary damages only as the evidence may

178, 179 satisfy you the plaintiffs have sustained, and as you may think proportioned to the injury resulting from such death."

To which charge of the court the plaintiffs, by attorney, in open court excepted as a mistake in law, and that the court erred in so charging the jury.

After the return of a verdict by the jury for the defendant the plaintiffs filed a motion for a new trial and rehearing because of the error and misinstruction of the jury, which motion was by the judge overruled, to which ruling of the court the plaintiffs, by attorney, excepted in open court as error.

In relation to each of above exceptions the plaintiffs tender this bill of exceptions and pray that the same be signed, sealed, and made part of the record of the proceedings in this cause, which is accordingly done.

T. H. DEVAL, [SEAL.]
U. S. Judge.

180 *Additional statement of facts.*

The defendant offered evidence to show that the pilot or cow-catcher to engine No. 4 was a few days before the accident slightly damaged, or knocked out of square, and that said pilot was repaired by worked in defendant's shops, and by them considered safe, and that after said repairing the deceased received and ran the engine with the pilot so repaired without objection. Also that a few days before the accident engine No. 4 was in the defendant's shops for repairs, and that the foreman of the defendant's round-house, finding the whistle a little loose, secured it tightly into its place, and considered as safe as he could make it under the circumstances.

Defendant respectfully submits there was evidence to show that he was, at his own request, placed upon the run which required him to use said engine No. 4. Also that no new pilot was made specially for engine No. 4, but that it was the custom of the defendant to keep new pilots on hand to be used as they might be needed. Also that if

181 the whistle of engine No. 4 was out of its place after the accident it did not blow out, but was knocked out by reason of the fact that the engine was thrown from the track by a bull or steer running under the engine between the driving-wheels and trucks, the engine then running at the rate of about 12 miles an hour, and being turned over, and down an embankment 8 or 10 feet high, and said whistle being thrown against a stump.

No evidence whatever was offered tending to show that any of the agents or servants or employees of defendant's were incompetent or not qualified for the duties to which they were assigned.

The foregoing additions to the statement of facts, as contained in the plaintiff's bill of exceptions, have been presented to me by defendant's counsel, and are hereby certified to be correct. At their request, the same are ordered to be filed and the clerk directed to copy the same into the record as a part thereof.

T. H. DUVAL,
U. S. Judge.

182 April term, 1876.

UNITED STATES OF AMERICA,
Western District of Texas.

ANNIE HOUGH, & ANNIE HOUGH, NEXT FRIEND of Hough,
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1526.

To the Hon. the judges of the circuit court of the United States for the western district of Texas, at Tyler.

The plaintiffs in the above entitled suit, Annie Hough, in her own right, and Annie Hough, the next friend of James A. Hough, her minor child, represents that the above cause, numbered 1526, on the docket of the circuit court of the United States for the western district of Texas, at Tyler, was tried and a judgment rendered therein for the defendant, the Texas & Pacific Railway Co., at this April term, 1876, before the circuit court of the United States at Tyler. They represent that the amount involved in said suit, exclusive of costs, greatly exceeded the

sum of five thousand dollars; that on the trial of said cause manifest errors of law were committed, and for the revision and correction of said errors by our Supreme Court of the United States, they pray for a
183 writ of error to said Supreme Court, and that said errors may be revised and corrected and the cause revised and remanded to the circuit court, that said Supreme Court may cause further to be done therein to correct the errors what of right should be done according to the laws and customs of the United States.

They further represent that they are citizens of the State of Iowa, residing at Clinton, and the said defendant is a corporation, a citizen of the State of Texas, whose principal office is at the city of Marshall, county of Harrison, State of Texas. They pray for citation to said defendant as required by law, and such other proceedings be had therein as may be necessary and proper.

ROBERTSONS & HERNDON,
Att'ys for Plaintiffs.

The writ of error as prayed for as in the foregoing petition allowed.

T. H. DUVAL.
U. S. Judge.

184 Be it remembered that at a regular and stated term of the circuit court of the United States for the western district of Texas, begun and held at Tyler, in said district, the following proceedings, among others, were had on, to wit, the 4th day of December, A. D. 1875.

TUESDAY, *May* 30, 1876.

ANNIE HOUGH
vs. } 1526.
THE TEXAS & PACIFIC RAILWAY COMPANY.

The plaintiffs in this cause presented their petition for writ of error, and same was allowed.

185 I, W. C. Robards, clerk of the circuit court of the United States for the western district of Texas, at Tyler, do hereby certify that the foregoing one hundred and eighty-four pages of manuscript contain a full, true, and correct copy and transcript of the record in the case of Annie Hough et al. vs. The Texas & Pacific Railway Company, as appears from the records of said court.

In testimony whereof I hereto set my hand and affix the seal of said circuit court, at Tyler, in said district, this 8' day of September, A. D. 1876.

[SEAL.] W. C. ROBARDS,
Clerk U. S. Court.

I, T. H. Duval, judge of the district court of the United States for the western district of Texas, sitting as judge of the circuit court of the United States for the said district, do hereby certify that W. C. Robards, whose genuine signature is affixed to the above certificate, is, and was at the date thereof, clerk of said circuit court, and that full faith and credit are due his official acts, and that his attestation is in due form.

To certify which I hereunto set my hand, at Austin, in said district, this 11' day of September, A. D. 1876.

T. H. DUVAL,
U. S. Judge.

I, W. C. Robards, clerk of said circuit court, do hereby certify that T. H. Duval, whose genuine signature is affixed to the above certificate, is, and was at the date thereof, judge of said district court, and sitting as judge of said circuit court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Tyler, Texas, this 13' day of September, A. D. 1876.

[SEAL.] W. C. ROBARDS,
Clerk U. S. Circuit Court.

186 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Tyler, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Annie Hough et al., who are plaintiffs, and the Texas and Pacific Railway Company, who is defendant, No. 1526 on the docket of said circuit court of the United States, sitting at Tyler, in said district, a manifest error hath happened, to the great damage of the said Annie Hough et al., who are plaintiffs in error herein, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 30' day of May, in the year of our Lord one thousand eight hundred and seventy-six, and seal of our said circuit court, at Tyler, in the 100' year of the Independence of the United States.

W. C. ROBARDS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas at Tyler.

Allowed by—

T. H. DUVAL,
U. S. Judge.

187 United States of America to the Texas & Pacific Railway Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Tyler, wherein Annie Hough, and as the

guardian and next friend of her infant child, James A. Hough, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16' day of September, in the year of our Lord one thousand eight hundred and seventy-six.

T. H. DUVAL,
U. S. Judge.

Test with seal of court, at Tyler, this 16' day of Sept., A. D. 1876.

W. C. HOBARDS,
Clerk U. S. C. Court.

In the above cause citation in error having been issued, signed only by the clerk, and served upon us thirty days before the 1st Monday in October, 1876, we hereby waive any defect in said citation, as well as in this, and accept service upon this writ, and consent that this cause may stand for hearing in its regular order at the October term, 1876, of the Supreme Court of the United States of America, to be heard upon its merits. But this agreement is not to be construed so as to take the case up before it is regularly reached upon the docket.

This September 18th, 1876.

F. B. SEXTON,
W. STEDMAN,
Att'ys for Deft. in Error.

(Indorsed:) In Supreme Court of the United States. Annie E. Hough et al., pl'ff in error, vs. The Texas & Pacific Railway Company, def'ts in error. Citation in error.

188 In the circuit court of the United States for the western district of Texas, at Tyler.

UNITED STATES OF AMERICA, *ss:*

To the Texas and Pacific Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, at Tyler, wherein Annie Hough, and as the guardian and next friend of her infant child, James A. Hough, are plaintiffs, and the Texas and Pacific Railway Company are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the
189 said Supreme Court of the United States, this 30th day of August, in the year of our Lord one thousand eight hundred and seventy-six, and the 101 year of our Independence.

[SEAL.]

W. C. ROBARDS,
Clerk of U. S. Circuit Court.

THE STATE OF TEXAS,
Harrison County, ss:

On this 2d day of Sept., in the year of our Lord one thousand eight hundred and seventy-six, personally appeared before me E. R. Purnell,

to me well known, and makes oath that he delivered a true copy of the within citation to William Stedman, one of the attorneys of said Texas and Pacific Railway Company, on the 2d day of September, A. D. 1876, at the city of Marshall, Harrison County, Texas.

E. R. PURNELL.

Sworn to before me and subscribed in my presence this 2d Sept., 1876.

Witness my hand and notariel seal.

[SEAL.]

WILLIAM ROY,
J. P. & N. P. 3d Prec. Harrison Co., Tex.

Witness fees, 50c., paid by Pernell.

190 Filed Sept. 6th, 1876.

W. C. ROBARDS, *Clerk.*

(Indorsed:) No. 1526. In the circuit court U. S., west. dist. of Tex. Annie Hough et al. vs. The Texas & Pacific Railway Company. Citation issued Aug. 30th, 1876. W. C. Robards, clerk.

(Indorsed:) Annie Hough et al., plaintiffs in error, vs. The Texas & Pacific Railway Company, defendants in error. Transcript from the U. S. circuit court W. D. Texas, at Tyler. W. S. Herndon, At'y for plaintiff in error.

(Indorsement on cover:) No. 304. Annie Hough, in her own right & as natural guardian & next friend of James H. Hough, plaintiff in error, vs. The Texas and Pacific Railway company. W. Texas C. C. U. S. Filed 8th November, 1876.

In the Supreme Court of the United States.

ANNIE HOUGH, in her owa right, and as guardian and next friend of Jas. H. Hough, *Plaintiff in Error,*

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Defendant in Error.*

BRIEF of JAMES TURNER, of Counsel for Plaintiff in Error.

ANNIE HOUGH, in her own right, and as guardian and next friend of Jas. H. Hough, *Plaintiff in Error,*

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, *Defendant in Error.*

BRIEF of JAMES TURNER, of Counsel for Plaintiff in Error.

STATEMENT OF CAUSE.

The Plaintiff brings this suit to recover damages for herself and infant son, for the killing of her husband, Wentworth C. Hough, while in the employment of the Defendant in Error. The petition charges that, on the 8th day of March, 1874, the deceased husband was in the employment of the Defendant as a locomotive engineer, or driver, and in charge of their engine No. 4, running between Marshall, Texas, and Shreveport, Louisiana; that the engine, while in motion, struck a steer, and was thrown from the track; that the accident was without any fault or neglect of the engineer, Hough; that the engine was thrown from the track in consequence of the faulty construction of the pilot or cow-catcher, and that but for the faulty construction of said pilot orcow-catcher, no accident would have occurred. It then proceeds to set out

particularly wherein it was defective, and how the accident was occasioned thereby. It charges further that Hough, the engineer, was caught under the falling engine, and was killed by a jet of steam and hot water that escaped from the boiler; that the escape of steam and hot water from the boiler was owing to the defective fastening by which the steam of the whistle was secured in the dome cap of the boiler; that the whistle blew out or was torn out, and the steam and water escaped through the opening. The petition was filed originally in the District Court of Harrison county, Texas, and was removed by the Defendant to the Hon. Circuit Court of the U. S. for the Western District of Texas. There was a demurrer to the petition which was urged and overruled. (Trans pp. 1-2.) The Defendant answered with a general denial of all the allegations of the petition, and afterwards, by way of amendment, answered certain special matters of defense, to the effect that the engine was a safe and reliable machine, built after the usual and most approved plan; that the pilot or cow-catcher was properly constructed and properly fastened to the engine; that the accident was not occasioned by running over a steer, but that a bull butted himself in between the driving wheels and forward trucks of the engine, and threw it off the track.

It further states that the whistle was securely and thoroughly fastened to the boiler, in accordance with the usual and generally approved mode of fastening whistles to boilers; that the whistle was knocked out by coming in contact with a stump, and finally, that if there was any defect in the pilot or whistle, Hough, the engineer, knew of the defect, and if there

was any defect, it was latent and could not have been discovered by any external examination. (Trans. pp. 3-4.) On the pleading as hereinbefore stated, the cause was tried before the Hon. Thomas H. Duval, District Judge, sitting in place of Circuit Judge, at the April Term, A. D. 1876, which resulted in a verdict and judgment for Defendant. A motion for a new trial was made and overruled, and the cause is now brought to this Court by writ of error. The errors relied on relate entirely to the charge of the Court to the jury, and the action of the Court in overruling the Plaintiff's motion for a new trial. Evidence was offered by the Plaintiff to show that the accident in which Hough lost his life was occasioned by a defect in the pilot or cow-catcher in front of the engine, and by the defective fastening of the whistle into the dome cover of the boiler. Also, that the defect in the cow-catcher was owing to the negligence of the Master Mechanic of the Defendant's road, and of the foreman of round-house of Defendant at Marshall. Also, that the Master Mechanic was the officer employed by the Defendant, to whom was given exclusive management of the motive power of Defendant's road; that he had control over all engineers on the road, including Hough, the deceased, with power to employ, order, control and discharge them at his pleasure, and that all engineers on the road were bound to report to the Master Mechanic or foreman of the round house for orders, and that no engine went out on the road without the orders of one or the other of these officers. Also, that Hough, the deceased, knew of the defect of the pilot or cow-catcher of his engine, and had complained of this defect, both to the foreman of the round-

house and to the Master Mechanic; that he had been promised that the defect would be remedied on the next trip a number of times; that a new pilot or cow-catcher had been made, but had not been put on the engine, on account of the negligence of these officers, and the defect existed at the time of the accident. Also, other facts, showing the nature of his injuries and the manner of his death. (See printed Trans. pp. 55-56.) The Plaintiff also offered evidence to show the defect in the whistle and its fastening, and that, if properly fastened, it could never have torn or blown out of the dome cover, or, if it had broken off, that no steam could have escaped.

Also further evidence of the defect in the pilot. See depositions of R. McConnell, Record p. 9; D. B. Hearsey, Record pp. 13-14; H. L. Leach, Record pp. 18-19; C. C. Elliott, Record p. 26; J. A. Hough pp. 37-38. The last named witness testifies also as to the occasion of the injury, the nature of the injury, and as to how it occurred. He testifies as to the value of the services of the deceased to his family, his age, health, &c., as well as to the duties of a locomotive driver or engineer, and the duties of Master Mechanic, &c. I regret that the views of the learned Judge, who tried the cause, of the practice in this Court, would not permit a more particular statement of the evidence given orally before the Court. Enough of the evidence, however, is in the bill of exceptions and the depositions of witnesses to bring before the Court the errors in the charge of the Circuit Court to the jury, that are complained of. The pleading and evidence presented in the Circuit Court raised the following questions, as there contended by the Plaintiff and insisted on in this Court.

1st. In the case of a railway corporation employing a multitude of persons in different departments of the service and at different points on the road, only those are fellow-servants who are employed to work together, and in the same department of the service.

2nd. The chief agent or head of a department in the service of a railway corporation who has the power to employ, order, control aud discharge laborers in his department, is the representative of the master, and in no sense is he the fellow-servant of those employed, ordered and controlled by him, but he stands toward them in the room and place of the master, and his negligence is the negligence of the master.

3rd. The Master Mechanic and foreman of the round-house on the Defendant's road, with the powers and duties as shown by the evidence on the trial, were in no sense the fellow-servants of W. C. Hough, the engineer whose death was caused by their negligence.

4th. If the pilot or cow-catcher was defective, and if the defect was known to Hough, the engineer, and if its defective condition was reported by Hough to the Master Mechanic and the foreman of the round-house, and if the officers had promised to have it repaired, and that, under such promise and awaiting such repair, Hough continued to run the engine and was killed in consequence of the defect, he was not guilty of such contributory negligence as would preclude his wife and child from recovery. All these questions arise out of the evidence on the trial, to which I have already called the attention of the Court.

The Plaintiff in Error complained that the Circuit Court erred in its charge to the jury.

1st. The Court erred in charging the jury, as follows:

"The corporation or master, however, is not liable for injuries suffered by one employed, solely through the carelessness or negligence of another employee of the same master, engaged in the same general business and under the same general control. Each employee engaged with others in the service of a common master takes upon himself the liability to injury resulting from the negligence of his co-employees. The hazard is incident to the nature of the employment. There is no implied warranty of life or guaranty against injuries. The employee takes his place subject to the dangers incident to the position. The master is only bound to provide competent and proper machinery and materials, and to furnish skillful and careful employees to keep the same in repair and good condition. If this be done, and one of the workmen or employees thus provided is simply guilty of negligence resulting in an injury to another employee, it is not the negligence of the master and the corporation is not responsible. In such case, to render the corporation or master liable, the injury must have resulted to one servant, not from the mere negligence of another, but from his incompetency or unskillfulness, and this must be shown satisfactorily; and if the injury arises from a defect or insufficiency in the machinery or any of its necessary parts, which have been furnished by the master to the servant, a knowledge of this defect must be brought home to the master, or proof given that he was ignoaant of the same through his own negligende and want of proper care. In other words, it must be shown that he either knew or ought to have known of the defects which caused the injury, in order to render him liable. A different rule, however, would apply as

respects the liability of the master to a passenger over the road. *All agents and employees on a railroad, who are engaged in the same general employment and business of keeping up, running and operating the road, are fellow-servants. Master Mechanics, foremen of round-houses, and other persons engaged in the repair of machinery and rolling-stock for a railroad, are fellow-servants with the engineers, conductors and other persons engaged in running trains.*"

2nd. The Court erred in charging the jury, as follows:

"That, if they believed from the evidence that the accident which resulted in the death of W. C. Hough was produced by a bull running at or under the locomotive or tender, of which said Hough was the engineer, and throwing the same off the track, and that the accident occurred under such circumstances as that human skill and foresight could not prevent or reasonably provide against it, then the defendant was not guilty of negligence, and you will find for the defendant." (See printed Record pp. 56-57.)

3rd. The Court erred in charging the jury, as follows:

"If you believe from the evidence that the engiue No. 4 was, when purchased and set up by the Defendant, a standard and safe engine, and that the Defendant used due and proper care in the employment of competent, prudent and skillful agents to keep it in the same condition, and that the accident in question was not one resulting from the want of such competency, prudence and skillfulness,, then you will find for the Defendant." (See printed Record p. 57.)

4th. The Court erred in charging the jury, as follows:

"If there was a defect in engine No. 4 or in the pilot thereto attached, and you believe from the evidence that the

same was known to the deceased while he was running said engine and before the happening of the accident described in the Plaintiff's petition, or if you believe from the evidence, that some days before the accident the pilot attached to said engine was slightly damaged or knocked out of square, and that the same was repaired by the agents or servants of the Defendant, who were skillful and competent to make such repairs, and that after such repairs were made said pilot was considered as safe by those whose duty it was to make them and determine on their safety, and the deceased afterward received and run said engine and pilot, then, in either event, you are instructed that the Plaintiff cannot recover, and you will find for the Defendant." (See printed Record p. 57.)

5th. The Court erred in its charge to the jury, as follows:

"If the jury are satisfied from the evidence before them that the death of deceased was owing, not to the negligence simply, but to the incompetency or want of skill on the part of any servant or agent of Defendant, who was working in Defendant's machine shops, then the Defendant would be liable, and the Plaintiffs would be entitled to recover such actual pecuniary damages only as the evidence may satisfy you the Plaintiffs have sustained, and as you may think proportioned to the injury resulting from such death." (See printed Record p. 57.

The Court erred in overruling the Plaintiff's motion for a new trial, for the several reasons stated in the motion. (See printed Record, p 54.)

The portion of the charge quoted in the first assignment of error, brings before the Court three out of four of the questions of law that it is proposed to discuss. In case of a railway

company that does all its business through agents and servants, the one above and superior to another, are those who are superior and charged with all the powers of the master the fellow-servants of those employed under him, who obey his orders, move at his commands, and who can be removed and discharged at his pleasure? We maintain that the chief of a department, exercising such necessary control over his inferiors, is the representative of the master, and that his negligence is the negligence of the master. In support of the position, we cite the following authorities:

Cavens vs. Ry. Co., 9th Bush Ky. Repts. 559; Ry. Co. vs. Collins, 2 Duval 114; Ry. Co. vs. Fort, 17th Wallace 553; Stevens vs. Ry. Co., 20th Ohio 415; Cooper vs. Mullens, 30 Georgia 115; Ry. Co. vs. Keary, 3 Ohio State 202; Ry. Co. vs. Little, 19 Kansas 271

The Master Mechanic and under him the foreman of Defendant's round-house, being in charge of all the motive power of the road, to determine on the running of all the engines, to see to their repair and with power to employ, order, control and discharge engineers on the road, to determine what engineer and what engine should do a particular service, and when and how it should be done, with power to determine whether an engine needs repairs, and to order what repairs shall be made, and how made, were these officers the fellow-servants of Hough the engineer, or were they representatives of the master in their departments? We maintain that Hough was in no sense of the word a fellow-servant of any person employed by the Defendant in its machine or repair shop, and that in no sense of the word was he a fellow-servant of the Master Mechanic of Defendant's road or of the foreman of its round-house, and

that the judge was in error when he charged the jury that they were fellow-servants. In support of this position, we cite the following authorities:

Ry. Co. vs. Dunham, 46 Tex. 181; Brabbits vs. Ry. Co., 38 Wisconsin 289; Bass vs. Ry. Co., 36 Wisconsin 569; Fort vs. Ry. Co., 17 Wallace 553; Ford vs. Ry. Co., 110 Mass. 260; Ry. Co. vs. Jackson, 55 Ill. 492; Fitzpatrick vs. Ry. Co., 7th Ind 436; Chamberlain vs. Ry. Co., 11 Wisconsin 248; Snow vs. Ry. Co., 8 Allen 447; Keegan vs. Ry. Co., 4 Selden 180–1; Lanning vs. Ry. Co., 49 New York 521; Swainson vs. Ry. Co., 18 Am. Ry. Repts. 569; Ry. Co. vs. Gregory, 58 Ill 273; Ry. Co. vs. Ryan, 60 Ill 327; Sherman and Redfield on negligence sec. 102. The same doctrine was held in the case of Kelly vs. Belcher Mining Co., tried before Mr. Justice Field of this Court, sitting with Judge Hillyer for the Nevada Circuit at the June Term of 1875, and reported in Central Law Journal, vol. 2, page 705; also in the case of Knonesborough vs. Belcher Mining Co. before the same judges.

The only other question to which I desire here to call the attention of the Court, is this: If Hough knew of the defective condition of the engine and reported the defect, but continued to run it under the promise of the Master Mechanic that it should be repaired, was he guilty of such contributory negligence as would prevent a recovery here? We think not, and in support of this position we cite the following authorities: Brabbetts vs. Ry. Co., 38 Wisconsin 289; Ford vs. Ry. Co., 110 Mass. 260; The especial attention of the Court is called to the last cited case, where the same question was raised and ably discussed by the learned judge giving the opinion. In

Patterson vs. Ry. Co., decided by the Supreme Court of Pennsylvania at the January Term of 1875, the same doctrine was held. See Central Law Journal, vol. 2, page 639. See also Snow vs. Ry. Co., 8 Allen 441; also 53 Penn. State, 457. The manner of submitting the cause to the jury was very objectionable. Holding the affirmative of the issue, the Plaintiffs had a right to have their cause so submitted to the jury. But unless the law be with the Plaintiffs on the three propositions discussed, a reversal on another ground would be of no practical benefit. If Hough was, under the circumstances of this case, the fellow-servant of the officer who was employed by the Company to control and order him in all his movements, or running an engine, if he was fellow-servant of those charged with the duty of repairing the machinery on the road, then the judgment of the Circuit Court should stand. Or if Hough, knowing the bad condition of the pilot, under promise of the Master Mechanic that it should be repaired, continued to run it and was thereby guilty of contributory negligence, then the judgment should stand.

JAMES TURNER,
of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

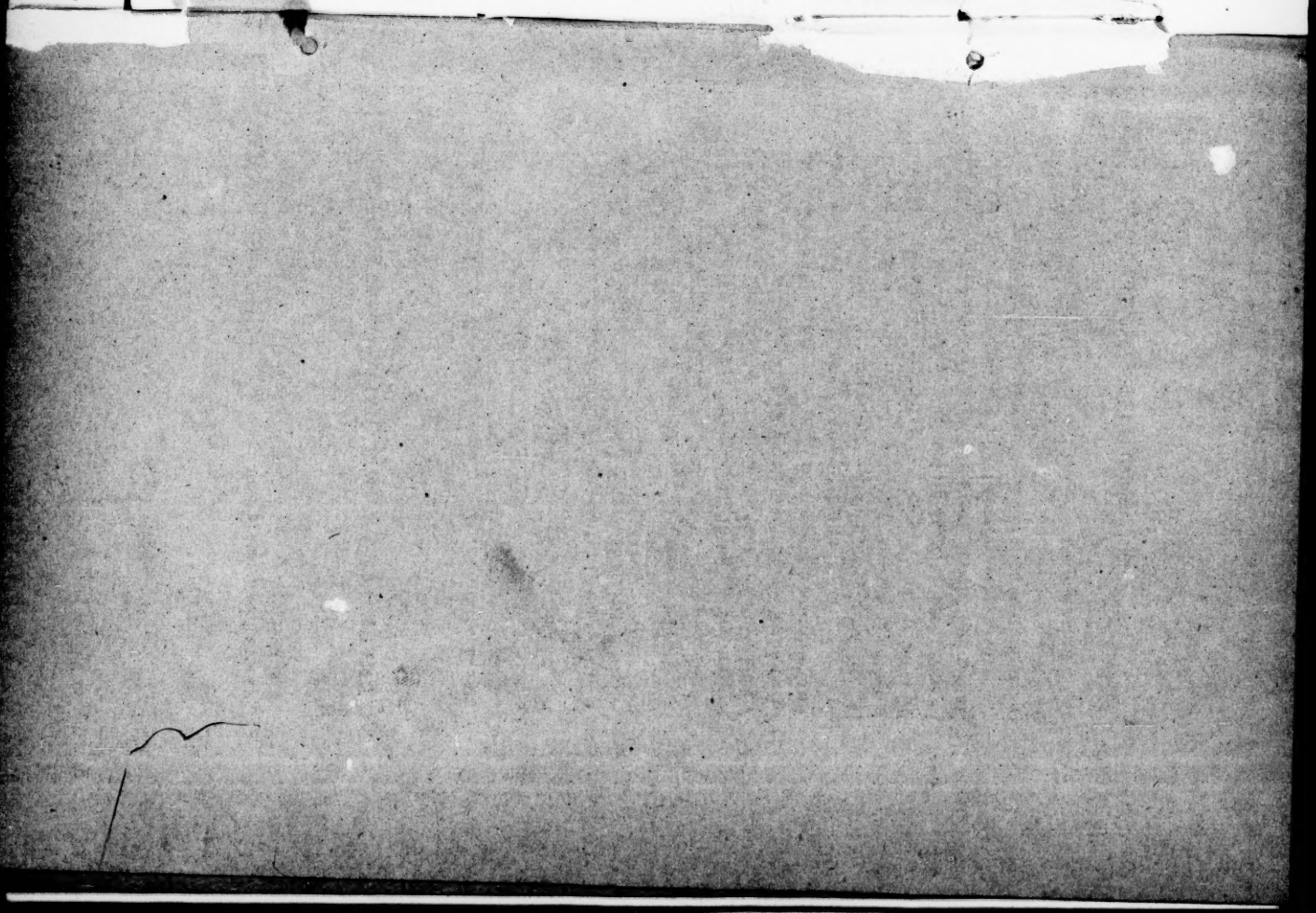
ANNIE HOUGH, in her own right and as guardian and next friend of James Hough, Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant in Error.

Brief of JOHN C. BROWN,
Counsel for Defendant in Error.

Thomas McGill & Co., Law Printers, 1107 E Street N. W., Washington, D. C.



ANNIE HOUGH, IN HER OWN RIGHT AND AS GUARDIAN AND NEXT FRIEND OF JAMES HOUGH, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, DEFENDANT IN ERROR.

Brief of John C. Brown, Counsel for Defendant in Error.

STATEMENT OF CAUSE.

The nature of the action is substantially set forth in the brief of James Turner, Esq., of counsel for the plaintiff in error.

The issues may be summed up as follows:

The plaintiff alleged—

1st. That the death of Wentworth Hough, a locomotive engineer in the service of the defendant, was caused by the gross negligence and carelessness of the defendant, to supply suitable and safe machinery, and a suitable and safe railroad over which to run its trains.

2d. That the pilot or cow-catcher of engine No. 4, which he was running when killed, was set or adjusted so high, that it did not serve to throw the bull or steer off the track when crossing ahead of it, in consequence of which the locomotive, coming in contact with the animal, was thrown from the track and the engineer killed.

3d. That the steam-whistle was so imperfectly and insecurely fastened, that when the engine upset it was blown out of its place, and the engineer so scalded, that death ensued.

The defendant pleaded the general issue.

So much of the plaintiff's petition as alleges that the defendant failed to furnish a suitable and safe track need not be considered, because the record contains no proof tending to sustain it, and it may therefore be regarded as abandoned. While it is true the record discloses some apparent conflict in the evidence, as to whether there was a defect in the pilot or cow-catcher, it nevertheless exhibits no distinct evidence of any individual witness tending to show any defect; but in the bill of exceptions it is stated that the plaintiff "offered evidence to show" that the cow-catcher or pilot was defective; but the proof, as a whole, is overwhelming that there was no such defect. The father of the deceased, on page 39, states that the pilot or cow-catcher was not "well shaped"; but he also states that he did not examine it, and only saw it "casually after the accident." On the other hand, the master mechanic, (McMillan,) on page 31, proves positively that he inspected the engine on the 7th of March, and it was not defective in any particular. But if it be true that the animal whose presence caused the accident was not on the railroad track ahead of the train, but came in at the side of the track and attacked the locomotive by thrusting his horns and body between the forward trucks and the driving-wheel, as the locomotive slowly passed, and, becoming entangled between the wheels, the locomotive was thrown off, the condition of the pilot or cow-catcher need not be considered; for its imperfections or defects, whatever they might have been, could not have contributed to the accident.

The only legal or competent evidence on this subject, disclosed by the record, is the testimony of Mr. Lord, the mail agent on the train, who saw the animal some moments before the accident occurred, and swears positively that the bull ran into the engine from the side, and, becoming entangled between the trucks and driving-wheels,

the locomotive was upset. (See pages 22 and 23 of the record.)

The statement of deceased to his father, is certainly not competent evidence. The record does not disclose the fact that he was conscious of being *in articulo mortis* when he made the statement.

Lord is not otherwise contradicted; indeed, his evidence is corroborated by the subsequent examination of the cow-catcher and the forward trucks, which showed no evidence of having come in contact with the animal, while the left driving-wheel, being on the side from which the animal approached, had on it clotted blood and hair, showing that it had been in contact with the bull.

Another question of fact presented is the condition of the steam-whistle; that is, was it attached after the most approved methods? or was the scalding of the engineer the result of the insecure fastening of that appendage to the boiler?

On this point there is some apparent conflict of evidence; but certainly the record discloses sufficient evidence to justify the verdict of the jury.

Master Mechanic McMillan, on pages 31 and 32 of the record, proves that he inspected the engine on the 7th of March; when it left Marshall it was in good condition; and on page 32 states that an examination of the wreck, immediately after the accident, satisfied him that the steam-whistle was forced from its fastenings by coming in contact with a stump, as the locomotive was precipitated from the track down the embankment twelve or fifteen feet below the grade.

The father of deceased believes that the fastening was not sufficient, because one or more of the threads were pulled out; still some of the experts believe it very probable that a violent concussion of the steam-whistle with a hard substance, would have forced it from its fastenings, although attached by the most approved methods.

The master mechanic (McMillan) proves, on pages 31 and 32, that "engine No. 4 was thrown from the track near Scott's Crossing, and I visited the wreck the same evening; I found engine No. 4 on her right side in a ditch; her whistle was *bent over and torn out*, and a small stump lying against the whistle (to the best of my knowledge the stump knocked it out)." And on page 32, in answer to the eighth direct interrogatory, he states: "I did examine the whistle and whistle hole. I made the examination at the wreck, and in the shop. I did not discover any defect in the plan of fastening the whistle to the locomotive. I do know how whistles are fastened to locomotives; the proper and usual mode of fastening whistles to locomotives is to screw them into the dome cap, as this one was fastened."

But it must not be overlooked that the locomotive engineer, who was unfortunately killed in this accident, was himself a skilled mechanic, and it is a well-known fact that railroad employés in his particular line of duty are required to report, at the end of each trip, any defects in their machinery. This was a rule of defendant, posted in its shops and round-house. (See answer to 10th direct interrogatory of McMillan, the master mechanic, page 32.)

On page 37, J. A. Hough, the father of the deceased, in answer to second direct interrogatory, says that "he (his son) was a first-class machinist and a first-class engineer, being *used* in all branches pertaining to his trade, including drafting. * * * He was *aptly qualified* to take charge of any locomotive machine shop," &c.

And the master mechanic, on page 32, in answer to direct interrogatory 11, says: "The whistle of engine No. 4 was never reported to *be* (me) as leaking; if it had leaked, it would have been the duty of the engineer in charge to report it to me."

The legitimate inference from all which is, that there was no defect in the steam-whistle.

But if there was, we insist that it did not cause the engineer's death. His father, on page 38, in answer to the fifth interrogatory in chief, swears: "He was badly burned." * * * "His being burned was the cause of his death;" but says: "*Probably* the immediate cause was inhaling steam." This latter is a guess or speculation. The fact is distinctly stated that he was badly burned, and that was the cause of his death.

Of course, this was no fault of the steam-whistle. It is evident that the upsetting of the locomotive threw the fire out of the furnace, and the engineer died from burns received from that cause; for his father, in answer to interrogatory 7, which asks, "Do you know when and how the injury was occasioned, of which your son died?" replied that "He was burnt by his engine being thrown from the track, on 8th March, 1874."

And the cross-examination of this witness develops the fact that he knew nothing of any injuries that the deceased may have received from the escaping of steam from the boiler, only what the deceased and the fireman told him.

The chief controversy, however, grows out of the instructions of his honor, the circuit judge, to the jury. They are fully set out in the record and correctly quoted in the brief of Mr. Turner, of counsel for plaintiffs; and although the counsel alleges error generally in the whole charge and as set out in the record, yet its correctness is not seriously controverted, save as to two points, to wit:

1st. That all agents and employés of a railroad who are engaged in the same general employment and business of keeping up and running or operating the road, are fellow-servants. Master mechanics, foremen of roundhouses, and other persons engaged in the repair of machinery and rolling stock for a railroad, are fellow-servants with the engineers, conductors, and other persons engaged in running trains.

2d. That if there was a defect in engine No. 4, or in

the pilot thereto attached, and the jury should believe from the evidence that the same was known to the deceased while he was running said engine, and before the happening of the accident described in plaintiff's petition, or that if the same was repaired a few days before the accident, and, in either event, deceased ran said engine, then the plaintiff was not entitled to recover.

For the defendant, we insist that these instructions, together with the other instructions, as they appear in the record, are fully sustained, both by reason and authority, and that the jury could in no sense have been misled by them.

For the plaintiff in error, it is insisted that although the general rules of law announced by his honor the circuit judge may be correct in the abstract, yet inasmuch as a railway company does all its business through agents and servants, some superior to others, these principles do not apply except as among classes of railroad employés; that the chief of a department exercising control over his various inferiors is the representative of the master, and that his negligence is the negligence of the master. The plaintiff's counsel also insists that the master mechanic, being in charge of the motive-power of the road and of its repair, and having the right to control and discharge the engineers who run the locomotives, and power to determine what engineer and what engine shall do a particular service, and when and how it shall be done, with the right to determine whether an engine needs repairs, and to order what repairs shall be made and how made,—that such master mechanic is in no sense a fellow-servant or co-employé with an engineer, but that he sustains the relation of a master to that engineer, and that therefore any negligence of the master mechanic is the negligence of the company.

One or two of the authorities cited by the learned counsel, sustain his general proposition, but the preponderance

of American authority, as well as English, is against it. The Supreme Court of Texas, in two well-considered cases decided at a recent term, have not only repudiated that doctrine, but have ruled in entire consonance with the instructions of his honor, the circuit judge, in the case now being considered.

In the case of Price *v.* Houston Direct Navigation Co., 46 Texas, page 535, and in the case of Robinson *v.* Houston and Texas Central Railroad Co., 46 Texas, page 540, the doctrine is distinctly and unequivocally enunciated, that all employés of a railroad company are fellow-servants.

In the last cited case, of Robinson *v.* H. and T. C. R. R. Co., 46 Tex., on page 550, the learned judge, in delivering his opinion, says:

"It is urged that the general rule, which holds that a servant cannot recover damages from the master for an injury sustained by reason of the negligence of a fellow-servant, is not applicable in this case, because the injury to appellant *resulted from the negligence of the* conductor, for the time being, to whose direction and control the plaintiff [a brakesman] was subjected. For a time, as says Judge Cooley, (Southern Law Review, April, 1876, p. 110,) a strong disposition was manifested in some of the courts to hold this view." "We, however, agree with him, that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of another, and it seems *impossible*, therefore, to hold that the servant contracts to run the risks of negligent acts or omission on the part of one class of servants, and not those of another."

"This," continues the learned judge, "it is believed, is now recognized as the sounder and best approved rule, both on reason and authority." He cites—

Priestly *v.* Fowler, 3 Mees. & W., 1.
Coon *v.* S. & H. R. R., 5 N. Y., 492.
Warner *v.* Erie R. R., 39 N. Y., 468.
Columbus *v.* Arnold, 31 Ind., 174.
Chicago *v.* Murphy, 53 Ill., 336.
6 Cush., 75; 32 Vt., 473; 20 Md., 42; 23 Pa., 384.

In the same case it was insisted for the plaintiff, who sustained the injury, that the accident was caused by fresh sand being permitted to lie along the track of the railroad. The judge, however, says: "If the sand was placed there by a mere fellow-servant in the employ of the appellee, (railroad company,) appellant has no cause of complaint."

And in answer to the argument, that one of the brakesmen of the train had charge of it as conductor, and no other brakesman had been put on in his place, and that he was not a competent person to act as conductor, the court say: "If he was not competent, appellant was fully cognizant of the arrangement, and made no objection whatever to it." And cites in this connection—

Ship *v.* Eastern Co's. Railroad, 9 Ex. R., 223.
24 Law and Equity, 396.
Williams *v.* Clough, 3 H. & N., 260.
Mad River *v.* Barber, 5 Ohio St., 562.

In the other case, 46 Tex., p. 336, Price *v.* H. D. Navigation Co., the court say: "It can now hardly be regarded as an open question, that a master is not liable to a servant for injuries sustained through the wrongful act, negligence, or default of a fellow-servant."

And this opinion is sustained by an unusual array of authorities.

The case cited by the counsel for the plaintiffs from volume 2 of the Central Law Journal, is not sustained by the authorities therein relied upon. One of the cases (17 Wall., 554) only holds that the master is liable where one of his servants, acting within the scope of his authority, orders another servant to incur a hazardous risk not within the latter's contract of service, and is thereby injured. In that case, Judge Dillon instructed the jury below, and enunciated the very doctrine we insist upon here

as the law, but stated distinctly that the case on trial depended upon another and wholly different principle.

Judge Cooley, in his able article in the Southern Law Review, 1876–7, p. 110, enunciates with great force and clearness the very same principle that Judge Dillon did on the trial of the case before cited and announced in his charge to the jury. Among other things, also, he says that the *foreman* is a servant as much as any other servant whose work he superintends. These principles are fully recognized in 5 Exchequer, 354; Feltham *v.* England L. R., 2 Q. B., 33.

In a celebrated case in 5 Ohio State Reports, Mad River and L. E. R. R. Co. *v.* Barber, 560, (a case where a conductor of a freight train had received injuries from an accident to his train,) the court says: "The company is presumed to use reasonable and ordinary care and diligence, in the selection and employment of competent and suitable agents and employés in keeping its road in repair, and providing it with sufficient and suitable machinery and cars for its use. The company, therefore, became responsible to him [the conductor] when in case of an injury received by him through neglect of that reasonable and ordinary care and diligence, in the performance of its duty which it was presumed to exercise, and in contemplation of which its employés made their engagements. But this neglect, in order to create liability on the part of the company, *must be the wrongful act of the company*, as distinguished from the neglect of a mere *operative or agent* of the company.

On page 565, in the same case, the court says: "If he (the conductor) knew of the defects or insufficiency of the cars or machinery, and without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk and waived his right as against the company." And on the same page, the court says: "Injuries received because of unknown

or latent defects in machinery, cannot be recovered for by a conductor who is injured."

"The master does not guarantee that either building, machinery, or organization should be perfect." (Wharton on Negligence, sec. 232.)

It was held in Kelly *v.* Norcross, 121 Mass., 508, that a master is not liable for defective apparatus if he used suitable material and employed competent workmen.

That was the case of a man employed by contractors who was killed, while mixing mortar on the floor of the building being constructed, by the falling upon him of the staging and stones on it, and his personal representatives brought an action against the contractors.

The Court, on page 510, say:

"They [the contractors] provided the men and material for the work of erecting the building, and the staging, by means of which the wall was to be built, was constructed by the carpenters employed by them." * * * "If there was neglect on the part of the *carpenters*, either in the construction of the staging or in leaving it, after it had been partially constructed, to be continued or completed by the masons, it was the neglect of the fellow-servant of the plaintiff's intestate, who were competent to have properly performed the work." * * * "In what they did, *the master did not assume to superintend or direct.*"

"He [the master] would not be responsible to the workmen themselves, who thus erected the staging, for an injury occasioned by its negligent construction, as they took the charge of and responsibility for that which was to be accomplished, and he is not responsible to the servant who worked with them and was injured by their neglect."

Corporations, and especially railroad companies, must of necessity do all their work through agents, and certainly occupy as high ground as contractors to construct a house.

They (the contractors) employ the carpenters, stone masons, mortar mixers, hod carriers, &c.

So the railroad company employs its general and division superintendents, master mechanics, foremen of round houses, &c. The locomotive engineer is in the same department with the master mechanic, and is his fellow-servant, just as the mortar-mixer is a fellow-servant with the workmen who erected the staging in the case cited.

The master mechanic is amenable to the orders of the superintendent, and so is the engineer. They are both co-laborers in the motive-power department. And each has his contract, not with the other, but with the Texas and Pacific Railway Company.

The case relied upon by plaintiffs, of Ford *v.* F. R. R. Co., 110 Mass., 240, is overruled by the 116 Mass. case above cited, or so far modified as that it is no longer authority on this special question.

It is said in the standard work of Shearman & Redfield on Negligence, sec. 87, "that a master is not liable to his servant for defects in the material furnished to the latter for use in the master's service, if he [the master] was not personally negligent in providing such material, or in omitting to warn the servant of their defects."

And in the foot-note, sustained by numerous authorities, it is said: "*So it has been adjudged*, when it appeared that the defect was occasioned by the incompetency or neglect of a fellow-servant."

"The fact that the injured employé was under the control of the servant by whose negligence the injury was caused, makes no difference,"—they are fellow-servants. (Shear. & Redf. on Neg., sec. 100.) And this doctrine is fully sustained in 55 Penn. St., 460; 3 Cush., 270.

But it cannot be denied that, even according to the interpretation of the evidence by plaintiffs, the deceased contributed to his own injuries. They assume that the de-

ceased knew of the defects in the engine, and the father of the deceased, as we have seen, proves that his son was a good locomotive builder.

In the case of Clark *v.* Holmes, 7 H. & N., adopted by Allen, J., in Gibson *v.* Railroad Co., 63 N. Y., p. 452, this doctrine is fully sustained. Among other things it is said: "If he [an employé] thinks proper to accept employment on machinery defective from its construction, or from the want of proper repairs, and with knowledge of the facts enter upon the service, the master cannot be held liable for injury to the servant, within the scope of the danger which both of the contracting parties contemplated as incident to the employment."

After quoting the above, Wharton on Negligence, sec. 214, remarks: "Hence, an employé, knowing that he is to be employed in running damaged cars, cannot complain of injuries sustained by him from one of the cars being damaged."

In 45 Ill., 198, stress is laid on the fact that the employé injured was ignorant of the defects of the machinery which caused the injury; and in 61 Ill., 131, the railroad company is held not liable, because the employé injured knew of the defect causing the accident. (So, also, in 38 Iowa, 592; 119 Mass., 412.)

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